[redacted] COURT, U. S.

[redacted] OF RECORD

[redacted] OF THE UNITED STATES

[redacted] Term, 1958

[redacted] No. 366

[redacted] PETITIONER,

v.

[redacted] DAM AUTHORITY

[redacted] THE UNITED STATES COURT OF CLAIMS

[redacted] October 24, 1958

[redacted] November 24, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 503

UNITED STATES, PETITIONER,

vs.

GRAND RIVER DAM AUTHORITY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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[fol. a]

IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY, a Public Corporation, and an Agency of the State of Oklahoma, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant

PETITION—Filed May 28, 1956

To the Honorable, the United States Court of Claims:

The plaintiff respectfully represents to the Court of Claims as follows:

1. The plaintiff, the Grand River Dam Authority (herein referred to as "Authority"), is a public corporation organized and existing under and by virtue of Article 4, Chapter 70, Session Laws of Oklahoma 1935, as amended and supplemented. Chapter 8, Title 82, Okla. Statutes 1951.) That it is a governmental agency, body politic and corporate with powers of government and with authority to exercise certain privileges and functions, among which are the following: To control, store, preserve, sell and distribute waters of Grand River and its tributaries for the purpose of irrigating arid, semi-arid and other lands and conserving and developing the forest and generating hydro electric power of the State of Oklahoma, to acquire by purchase, lease, gift or in any other manner, and to maintain, use and operate any and all property of any kind, real, personal or mixed, or any interest therein necessary or [fol. b] convenient to the exercise of the powers, rights, privileges and functions conferred and enjoined upon it by said Act.

2. The United States is sued herein on claim founded upon the Fifth and Tenth Amendments to the Constitution of the United States, as authorized by Section 1491 of Title 28, U. S. Code.

3. That the Grand River and its tributaries are non-navigable waters of the State of Oklahoma; and, the State of Oklahoma, by said Act creating the Grand River Dam

Authority, granted to and vested in the Authority all of the beneficial water rights in Grand River and its tributaries, and granted to and vested in the Authority the exclusive franchise, right and privilege to develop all of the water power in Grand River and its tributaries, and is now, and has been at all times mentioned herein, the sole and exclusive owner of said water and franchise rights.

4. That said Act specifically empowered and authorized the Authority to construct on Grand River in Oklahoma, the Pensacola, Markham Ferry and Fort Gibson Dams and power projects for the purpose of developing, generating and distributing hydro electric power and for other useful purposes.

5. The Authority, soon after its creation and organization, prpared and initiated a comprehensive plan to control, store and preserve the waters of Grand River and its tributaries in Oklahoma for the purpose of making beneficial use of the waters of Grand River and its tributaries for the development and generation of electric power and energy for sale and distribution and for other beneficial purposes, as shown by map hereto attached, marked Exhibit "A," and made a part hereof. Said plan and program provided that the system consist of three hydro elec- [fol. c] tric generating units, that is, the Pensacola, Markham Ferry and Fort Gibson generating units, which were to be constructed, operated and maintained as one system and unified project. Said plans called for the construction of said generating units in the following order: First, Pensacola, second, the Markham Ferry and Fort Gibson units. The Pensacola unit being the headwater unit, the Authority designed and constructed this unit to provide for storage and other headwater improvements for use and utilization at the Markham Ferry and Fort Gibson units, there being no power storage in either the Markham Ferry or Fort Gibson units. Under this plan, the Authority could use the waters stored in the Pensacola unit three times for the generation of electric power and energy.

6. The Authority completed the construction of the Pensacola unit in 1940 with a storage capacity of approximately 1,680,000 acre-feet at a maximum power pool elevation of 745 feet above mean sea level, with an additional storage for flood control of approximately 520,000 acre-feet

at elevation 755 above mean sea level, and a hydro power plant with an initial installation of 80,000 kilowatts, which has since been increased to 90,000 kilowatts. The Authority also acquired lands, easements and rights-of-way and constructed transmission lines, substations and facilities for the connection and integration of the Pensacola unit with the Markham Ferry and Fort Gibson units, and had surveys, plans and specifications made for the construction of the Markham Ferry and Fort Gibson units.

7. That the Seventy-seventh Congress, First Session, by Public Law No. 228, approved on the 18th day of August, 1941, an Act known as the "1941 Flood Control Act," (55 Stat. 638), and authorized the construction of the Pensacola, [fol. d] Markham Ferry and Fort Gibson Dams and reservoir projects for the production and generation of electric power and energy, under the direction of the Secretary of War. That said Flood Control Act of 1941 was passed and approved by the Congress after the Authority had completed and placed in operation the Pensacola unit, and after it had acquired lands, easements, rights-of-way and had constructed transmission lines, substations and facilities to connect and integrate the Pensacola unit with the Markham Ferry and Fort Gibson units, and after the Authority had made the surveys, plans and specifications for the construction of the Markham Ferry and Fort Gibson units.

8. That the United States, acting through the Secretary of the Army, has constructed the Fort Gibson power project on Grand River approximately 50 miles below the plaintiff's Pensacola project and near the plaintiff's Fort Gibson dam site, with a present installed generating capacity of approximately 49,000 kilowatts with provisions to add an additional 25,000 kilowatts at some future date. That the bottom of the power pool in the defendant's Fort Gibson power project is at elevation of 551 above mean sea level and the top of the power pool is at 554 above mean sea level. That the storage between elevation 554 and 582 is reserved for the control of flood waters. That the defendant's Fort Gibson power project, as constructed and operated, is incapable of producing any firm electric power and energy without the use of the plaintiff's water power, storage and headwater improvements at the Pensacola unit. That through the use of the Authority's water power and

the use of the storage and headwater improvements in the Pensacola unit, the defendant is able and can produce at its Fort Gibson power project approximately 94,600,000 kilowatt hours of firm energy per year.

[fol. e] 9. That on or about the 30th day of March, 1953, the defendant, the United States, appropriated, took and converted to its exclusive possession and use for the production of electric power and energy the plaintiff's franchise to develop, generate and sell electric power and energy from Grand River and its tributaries at the Fort Gibson site; and, appropriated, took and converted to its exclusive possession all of the plaintiff's water power rights in Grand River and its tributaries at the Fort Gibson site; and, appropriated, took and converted to its possession and use the storage and headwater benefits of the plaintiff's Pensacola unit to the Fort Gibson unit, all without the consent and approval of the plaintiff. That the defendant from and after the time of said appropriation and taking has exercised complete control of said property excluding the plaintiff from any and all control or use thereof.

10. That by reason of said taking by the defendant, the plaintiff has suffered loss of an integral part of its hydro electric generating system, the loss of its franchise to generate and develop electric power and energy at the Fort Gibson unit, loss of its water power rights at the Fort Gibson unit and the loss of the value of the storage and headwater improvements in the Pensacola unit, to the extent that the same is useful and beneficial to the Fort Gibson unit. That it has lost the costs that were expended in surveys, plans and specifications for the Fort Gibson unit, and by said taking and the severance of the Fort Gibson unit from the remainder of the plaintiff's system it has suffered damage to the remainder of its system.

11. That the plaintiff filed with the Secretary of the Army of the United States a claim in the amount of Ten Million Dollars ($10,000,000.00) in respect of said property appro- [fol. f] priated and taken, which claim was denied by the Secretary of the Army.

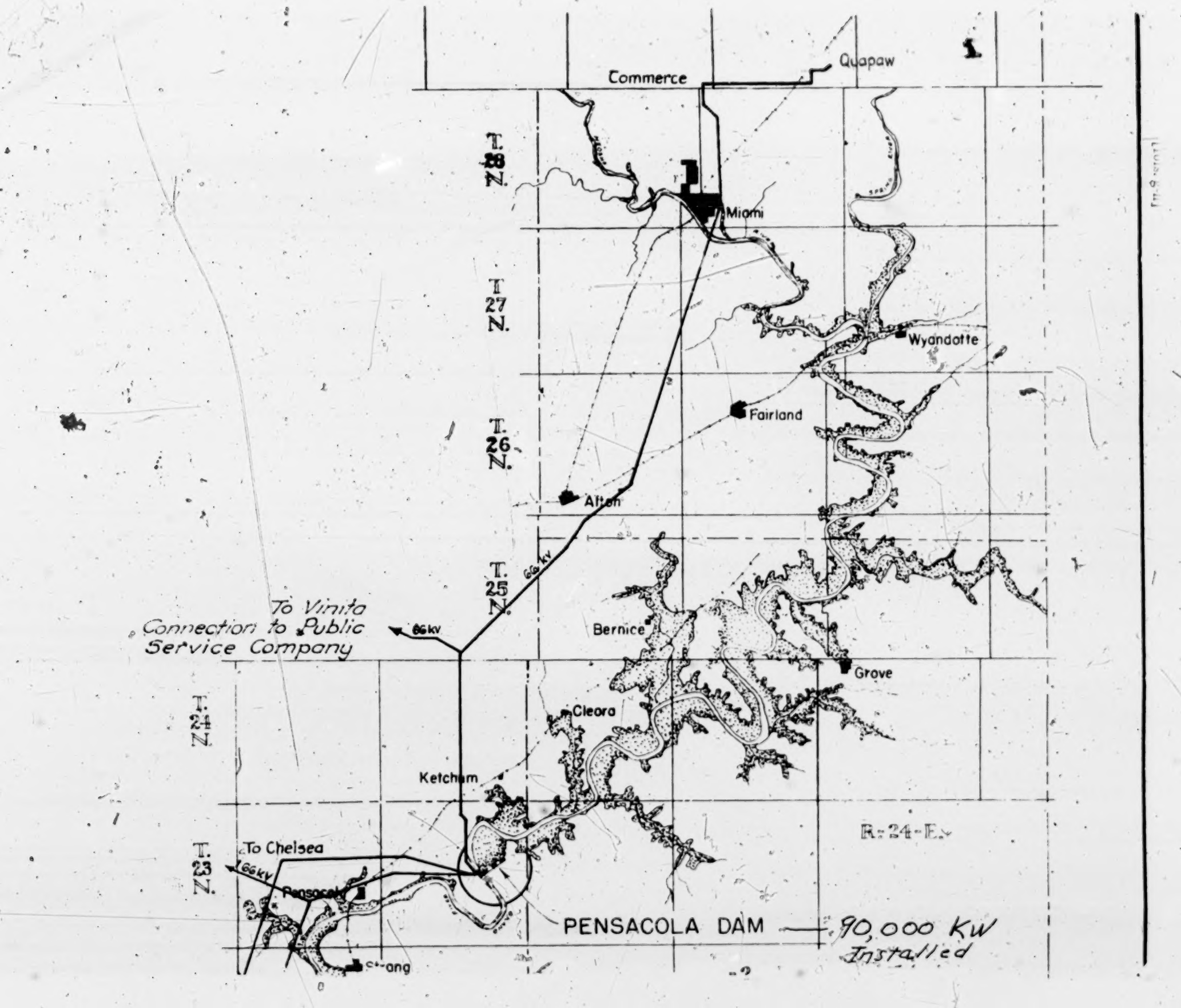
12. No action on said claim has been taken by Congress or by any department other than as set forth in paragraph 11 herein.

13. Plaintiff is the sole owner of said claim and has made no transfer or assignment of said claim or any part thereof.

14. By reason of the foregoing, plaintiff claims the sum of Ten Million Dollars ($10,000,000.00), plus an amount equivalent to interest at the rate of 6% per annum of said sum, from the 30th day of March, 1953, the date the defendant appropriated and took said property, to the date of entry of judgment herein under the provisions of the Fifth and Tenth Amendments to the Constitution of the United States, as fair and just compensation for the property appropriated and taken, and as damage to the remainder of the plaintiff's property not taken.

Wherefore, the plaintiff prays judgment against the United States in the sum of Ten Million Dollars ($10,000,000.00), together with an amount equivalent to interest at the rate of 6% per annum thereon from the 30th day of March, 1953, to the date of entry of judgment herein, and for such other and further relief as may be proper.

Q. B. Boydstun, P.O. Drawer 912, Vinita, Oklahoma,
Attorney for Plaintiff.


Commerce
Quapaw
T. 28 N.
Miami
T. 27 N.
Wyandotte
Fairland
T. 26 N.
Afton
T. 25 N.
66 kv
To Vinita
Connection to Public
Service Company
66kv
Bernice
Grove
Cleora
T. 24 N.
Ketcham
R. 24 E.
To Chelsea
66kv
T. 23 N.
Pensacola
PENSACOLA DAM — 90,000 KW
Installed

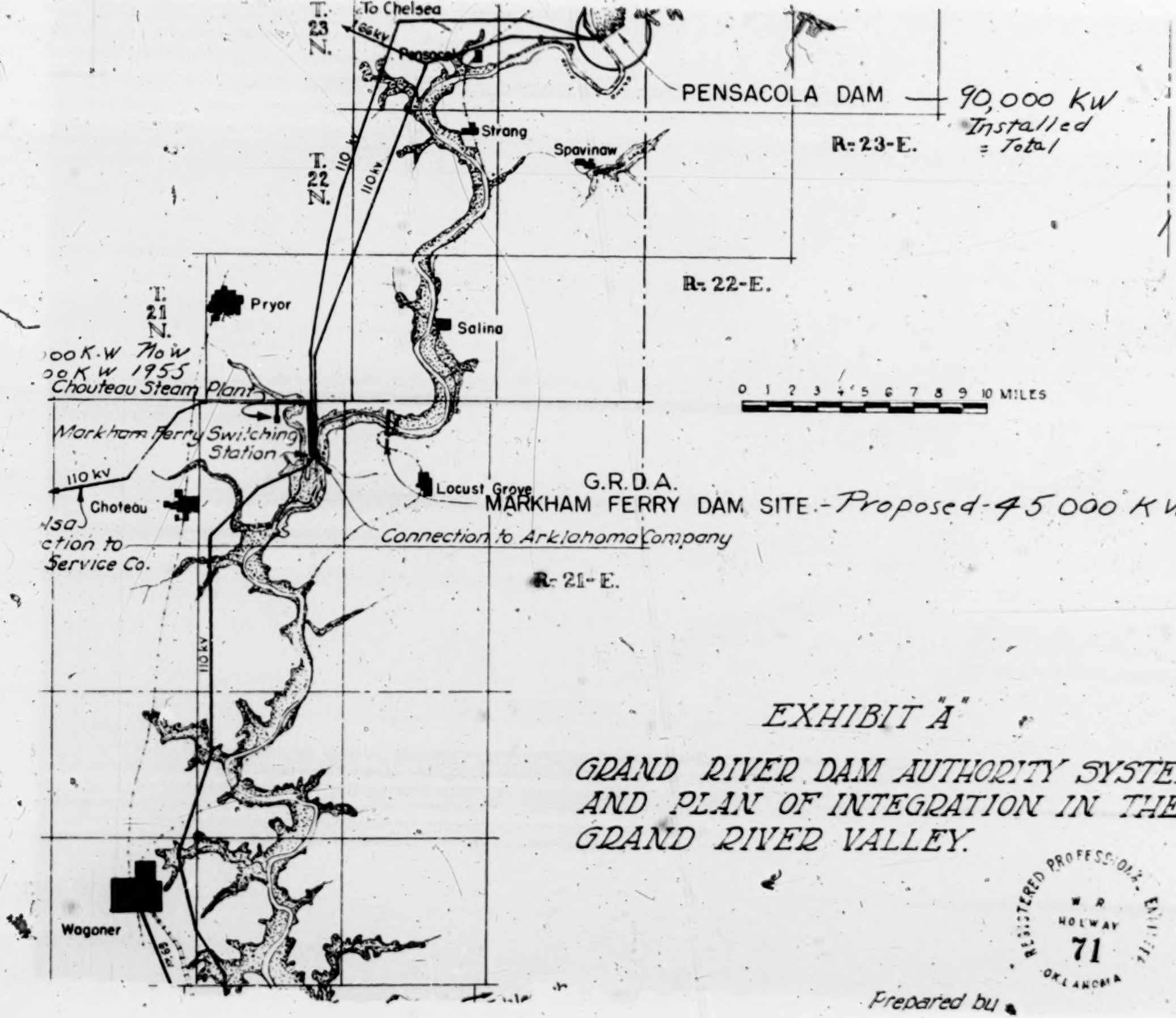


EXHIBIT "A"

GRAND RIVER DAM AUTHORITY SYSTEM AND PLAN OF INTEGRATION IN THE GRAND RIVER VALLEY.

REGISTERED PROFESSIONAL ENGINEER
W. R. HOLWAY
71
OKLAHOMA

Prepared by

EXHIBIT A TO PETITION

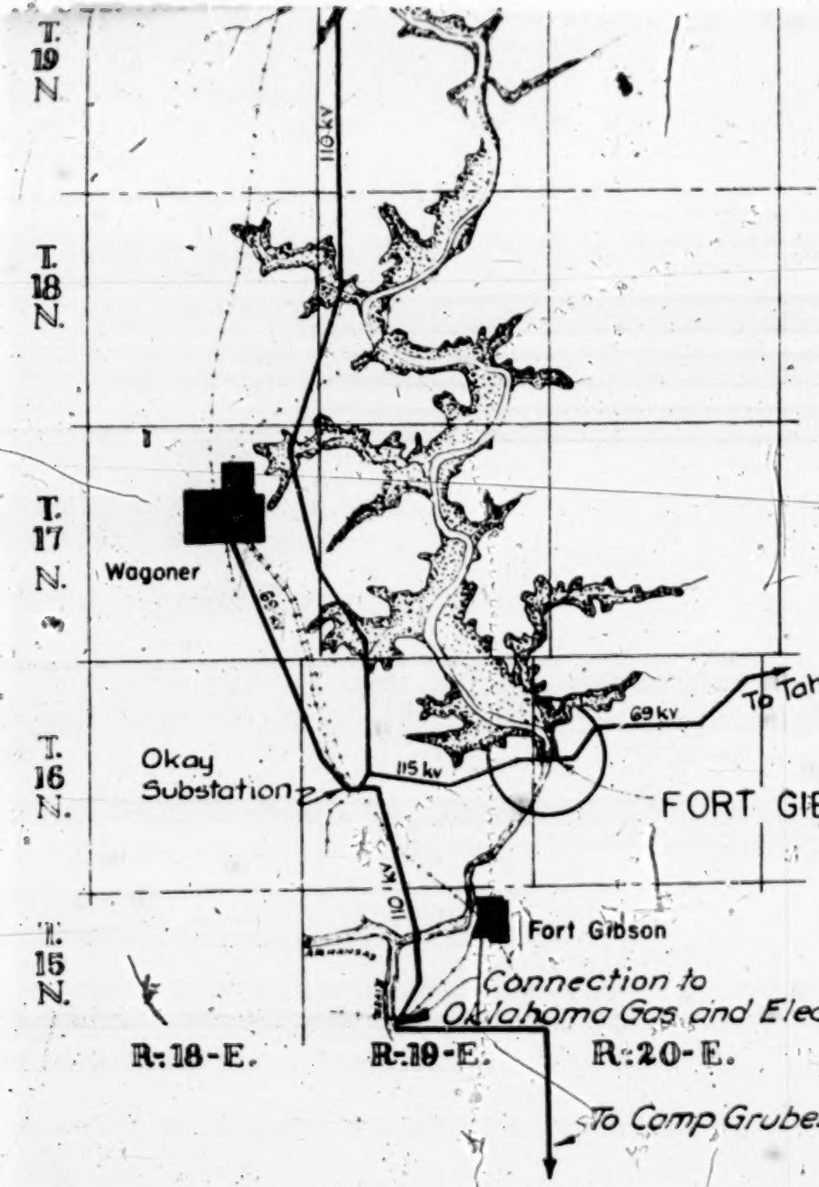


EXHIBIT "A"

GRAND RIVER DAM AUTHORITY SYSTEM AND PLAN OF INTEGRATION IN THE GRAND RIVER VALLEY.

REGISTERED PROFESSIONAL ENGINEER
W. R. HOLWAY
71
OKLAHOMA

Prepared by
W. R. Holway, Consulting Engineer.

Reg. No. MF-P 200

[fol. i] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

ANSWER—Filed September 7, 1956

The United States of America, by Perry W. Morton, Assistant Attorney General, for answer to the plaintiff's petition, respectfully shows:

First Defense

The petition fails to state a claim for which relief can be granted.

Second Defense

For its second defense, the defendant shows:

1. The defendant admits the allegations in paragraph 1 of the petition, except

(a) the defendant denies that the plaintiff was granted the exclusive right to use, distribute and sell the waters of the Grand River and its tributaries, but that the authority conferred upon the plaintiff by the State of Oklahoma to use, distribute or sell the waters [fol. j] of that river was made subject to the proviso that any municipal corporation within the area included within the jurisdiction of the plaintiff shall be entitled to take water from the Grand River or any of its tributaries in any quantities as may be needed by such municipal corporation, without payment of any fees or charges for such water;

(b) the defendant denies the allegation in paragraph 1 which purports to recite the extent of the power conferred upon the plaintiff to acquire, use and operate property. Defendant asserts that the recital omits a provision of the state statute, as amended and supplemented. That statute conferred upon the plaintiff the power to purchase, lease and maintain, use and operate any and all property or any interest therein, necessary or convenient to the exercise of the rights, privileges and functions conferred upon the plaintiff, as alleged, but also directs that the plaintiff:

> * * * own, construct, operate and maintain any property or works in conjunction or jointly with any other department or agency of the State of Oklahoma or the United States of America, or any department or agency thereof, within the boundaries of the District * * *

The defendant asserts further that the State of Oklahoma, in authorizing the development of the Grand River, contemplated that such development would be carried out jointly with the United States of America and in fact has been so carried out;

(c) the defendant asserts that although the plaintiff was authorized to acquire and operate property, all as alleged in the state statute cited, the plaintiff [fol. k] had no privileges and functions "enjoined upon it" by the state legislature.

2. Paragraph 2 of the petition states a conclusion which requires no answer.

3. The defendant admits that the Grand River and its tributaries are non-navigable waters of the State of Oklahoma but asserts that while, with the exception of its lower two miles, it was not generally considered a navigable stream, the matter of licensing the power operations is vested in the Federal Power Commission. The defendant specifically denies that the State of Oklahoma, by the act creating the Grand River Dam Authority, granted to and vested in the Authority all of the beneficial water rights in the Grand River and its tributaries. The defendant denies further that the plaintiff has acquired ownership of all of the beneficial water rights in the Grand River and its tributaries and denies that the State of Oklahoma granted to and vested in the Authority the exclusive franchise, right and privilege to develop all of the water power in the Grand River and its tributaries. The defendant also denies that the plaintiff is now and has been at all times mentioned in the petition the sole and exclusive owner of said water and franchise rights.

4. While under the act of the state legislature which created the plaintiff Authority, the plaintiff had the power to build the three dams mentioned in paragraph 1, the Au-

thority was not specifically directed to construct any particular dams.

5. The defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the [fol. 1] allegations in paragraph 5 and those allegations therefore are denied.

6. The defendant admits the allegations in paragraph 6.

7. The defendant is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations regarding the date and extent of the acquisition of lands, easements, rights-of-way and the construction of transmission lines, substations and facilities, and those allegations therefore are denied. The remaining allegations are admitted, except that the defendant asserts that the Flood Control Act of 1941, 55 Stat. 638, modified the Flood Control Act of 1938, 52 Stat. 1215,

> * * * to include the reservoirs in the Grand (Neosho) River Basin, in accordance with the recommendations of the Chief of Engineers in House Document No. 107 * * * of the Seventy-sixth Congress * * *.

The defendant alleges that House Document No. 107 did include the Pensacola, Markham Ferry and Fort Gibson Dams, but that by the time of the passage of the Act of 1941, the Pensacola Dam had already been constructed by the Grand River Dam Authority in 1940.

8. The defendant admits the allegations in paragraph 8, except

> (a) the allegation that the Fort Gibson Dam and Reservoir as constructed and operated is incapable of producing any firm electric power and energy without use of the Grand River Dam Authority's water power, storage and headwater improvements at the Pensacola [fol. m] unit is denied. The defendant asserts that even if the Pensacola unit did not exist, the Fort Gibson Dam and Reservoir would produce 10,700,000 kilowatt-hours of firm energy per year;
>
> (b) the defendant denies the allegation that through the use of the plaintiff's water power and the use of the storage and headwater improvements in the Pensacola unit, the Government is able and can produce at

its Fort Gibson power project approximately 94,600,000 kilowatt-hours of firm energy per year.

9. The allegations in paragraph 9 constitute conclusions of law which require no answer. Those allegations therefore are denied.

10. The allegations in paragraph 10 constitute conclusions of law which require no answer. Those allegations therefore are denied.

11. The defendant admits that by letter dated March 30, 1956, the plaintiff requested the Secretary of the Army to pay to it $10,000,000 and that the Assistant Secretary of the Army, by letter dated April 23, 1956, informed the plaintiff that the records of that Department indicate that all real property or interests therein taken for the Fort Gibson project have been acquired or are in the process of acquisition through purchase agreements or condemnation proceedings. The claim has not been allowed by the Department of the Army.

12, 13. The defendant is without information sufficient to form a belief as to the truth or falsity of the allegations in paragraphs 12 and 13 and those allegations therefore are denied.

14. The defendant denies the allegations in paragraph 14.

[fol. 11] Third Defense

For its third defense, the defendant alleges:

15. The plaintiff constructed its Pensacola unit during the period 1938 to 1941. The construction of the plaintiff's dam was financed beginning in September 1937 by the Public Works Administration, then an administrative branch of the United States Government. The construction of that dam was financed by a loan originally of $11,563,000 and a grant originally of $8,437,000. Those amounts were later increased and the defendant granted to the plaintiff $10,240,000 and loaned to the plaintiff a total of $12,510,000 for the construction of the plaintiff's Pensacola Dam.

16. The operation of plaintiff's Pensacola Dam was licensed by the Federal Power Commission, another agency of the defendant, effective January 1, 1939. On November 19, 1941, pursuant to Executive Order 8944, 6 Fed. Reg.

5947, possession of the dam was taken over by the Federal Works Administration, a federal agency. Possession of the dam was thereafter transferred to the Department of the Interior and to the Southwestern Power Administration under authority of Executive Orders 9366 and 9373, and by order of the Secretary of the Interior. Power from the dam was used in connection with national defense and the dam was returned to the Grand River Dam Authority on September 1, 1946, by presidential order.

17. Pursuant to a declaration of policy by the Congress of the United States in 1936, the Corps of Engineers of the Department of the Army conducted an investigation to determine the advisability of the construction of three dams [fol. 6] along the Grand River at Pensacola, Markham Ferry and Fort Gibson. On June 7, 1937, after public notice, a public hearing was held at Vinita, Oklahoma, called by the Corps of Engineers. The meeting was attended by various interested corporations, associations, private citizens and officials of the State of Oklahoma and several Oklahoma state agencies, including representatives of the Grand River Dam Authority, the plaintiff in this action.

18. At that meeting on June 7, 1937, the proposals for the construction of the three dams by the United States were explained by representatives of the Department of the Army.

19. At that meeting on June 7, 1937, Mr. George Shaefer, Chairman of the Grand River Dam Authority, read and filed a statement advising the Department of the Army that

> The Grand River Dam Authority is ready to assume its responsibility. With the power given it by the Oklahoma State Legislature we can and will issue bonds to carry out the part of the program as required by the United States Government.
>
> a. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the projects, i.e. Pensacola, Markham Ferry, and Ft. Gibson Dams.
>
> b. Hold and save the United States free from damages due to the construction works, to pay for all alterations to bridges, highways, railroads, pipelines, telephone and telegraph lines, and alterations to other

existing improvements made necessary as a result of the construction.

c. Maintain and operate all the works after comple-
[fol. p] tion in accordance with regulations prescribed by the Secretary of War.

In so many words the Grand River Authority with its power to issue 15 million dollars worth of bonds, is ready at all times to cooperate with the government in construction of these dams. We can meet any requirement you make upon us. Gentlemen, we are rarin' to go, let's build the Grand River Dams.

20. At the meeting of June 7,1937, the State Director of the Oklahoma Planning and Resources Board, another agency of the State of Oklahoma, presented the views of that board and stated:

> • • • in this particular area there has been superimposed upon this watershed, or a portion of this watershed, what is known as the Grand River Dam Authority created by the Act of the 15th Legislature, which in a manner eliminates any department from participation in this project. However, we are working hand in glove with this Authority and will continue to do so, protecting the water rights, looking after the people's interests in the Grand (Neosho) River and its tributaries.

21. Pursuant to the statements made by the Chairman of the Grand River Dam Authority, the plaintiff did in fact issue bonds to carry out the part of the program as required by the defendant and did provide certain lands, easements and rights-of-way for the construction of the Markham Ferry Dam and the Fort Gibson Dam.

[fol q-r] 22. By reason of the statements read and filed by the plaintiff's Chairman on June 7, 1937, and by reason of the matters set forth in this third defense, the defendant alleges that the plaintiff is now estopped from asserting all claims against the defendant set forth in its petition. The defendant further asserts that the plaintiff has waived the claims set forth in its petition and those claims, even if they existed, are forever discharged renounced and acquitted.

Respectfully, Perry W. Morton, Assistant Attorney General, Herbert Pittle, Attorney.

[fol. s] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

FIRST AMENDED ANSWER—Filed February 12, 1958

The United States of America, by Perry W. Morton, Assistant Attorney General, for its first amended answer to the plaintiff's petition, respectfully shows:

For its first, second and third defenses, the defendant adopts and realleges the matters set forth in its answer heretofore filed to the petition of the plaintiff.

Fourth Defense

For its fourth defense, the defendant shows:

1. The United States filed a declaration of taking and a petition in condemnation in Civil Action No. 2116 in the [fol. t] United States District Court for the Northern District of Oklahoma, to acquire certain lands owned by the plaintiff.

2. The plaintiff filed a motion to dismiss that action and that motion was overruled.

3. An order vesting title in the United States to the lands involved in that action was entered.

4. Thereafter, on November 21, 1947, the plaintiff filed a motion to vacate title of the United States and to dismiss the action. The grounds for dismissal and vacation of title urged by the plaintiff in that motion were substantially similar to the grounds asserted for its cause of action against the United States in the present case.

5. On February 10, 1954, the plaintiff filed an application in Civil Action No. 2116 for distribution of compensation and upon that application compensation was awarded.

6. The defendant asserts that the action of the plaintiff in applying for compensation in Civil Action No. 2116, in which it had raised the same legal questions presented in this case, and the proceedings in that case, constitute a bar to the present suit.

Fifth Defense

For its fifth defense, the defendant shows:

1. By the Act of July 6, 1954, 68 Stat. 450, the United States authorized the Department of the Army and every other government agency to cooperate with the plaintiff in the construction by the plaintiff of a dam at Markham Ferry, Oklahoma. By that Act Congress also appropriated [fol. u] $6,500,000 as a monetary contribution of the United States to the plaintiff for aid in the plaintiff's construction of that dam.

2. Section 3 of the Act of July 6, 1954 provides that the acceptance by the Grand River Dam Authority of the amount appropriated shall constitute the agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted of whatever nature including but not limited to acquisition of land, relocation, construction, operation and maintenance of the dam and reservoir.

3. The Act of July 6, 1954, also directed the Department of the Army to deliver to the plaintiff engineering plans and other data prepared by that Department for the proposed construction of a dam at Markham Ferry. The Department of the Army already has delivered to the plaintiff engineering plans and other data prepared by it at a cost of approximately $300,000.

4. The plaintiff has applied to the Department of the Army for the $6,500,000 appropriated by the Act of July 6, 1954. That sum has not yet been paid but negotiations were initiated for the purpose of arriving at a mutually satisfactory method of making payment of the amount appropriated by that Act of Congress.

5. By reason of the provisions of Section 3 of the Act of July 6, 1954, the defendant asserts that the acceptance by the Grand River Dam Authority of the amount for which it has applied and which was appropriated by that Act will constitute a complete bar to the present action, and this [fol. v] action, therefore, should be held in abeyance without decision until the Grand River Dam Authority receives and accepts payment of the sum appropriated and that thereupon the action be dismissed.

Wherefore, the defendant requests that the petition be dismissed and that the defendant have judgment against the plaintiff.

Respectfully, Perry W. Morton, Assistant Attorney General, Herbert Pittle, Attorney.

[fol. w] IN THE UNITED STATES COURT OF CLAIMS

[Title omitted]

REPLY OF PLAINTIFF TO DEFENDANT'S AMENDED ANSWER—Filed March 12, 1958

The Grand River Dam Authority, plaintiff, replies to the fourth and fifth defenses contained in defendant's amended answer.

Reply to Fourth Defense

1. The plaintiff admits the allegations in paragraph 1 of the fourth defense, but asserts that Civil Action No. 2116 in the U. S. District Court for the Northern District of Oklahoma, together with a declaration of taking, was filed on the 19th day of June, 1947, and a judgment on the declaration to taking was entered in said cause on the 24th day of [fol. x] June, 1947. That the lands sought to be acquired by the United States were owned by the plaintiff as a dam site for the Markham Ferry dam. That sair condemnation proceedings were filed prior to the adoption of Rule 71a of the Rules of Civil Procedure.

2. Plaintiff admits the allegations in paragraph 2 of the defendant's fourth defense, but alleges that said motion to dismiss is the same motion as referred to in paragraph 4 of defendant's fourth defense.

3. Plaintiff admits the allegations in paragraph 3 of defendant's fourth defense.

4. Plaintiff admits that part of the allegations in paragraph 4 of defendant's fourth defense, that on November 21, 1947, the plaintiff filed a motion to vacate the title of the United States and to dismiss the action, but denies that

the grounds for vacation and dismissal urged by the plaintiff in said motion were substantially similar to the grounds asserted for cause of action in the present case and the plaintiff further alleges that the grounds asserted in said motion were:

a. That the United States was not authorized to take the Authority's Markham Ferry dam site land for the Government's use at the Fort Gibson project.

b. That the taking of said lands by the Secretary of War was unlawful, unauthorized, capricious, arbitrary and an abuse of discretion.

That none of the subject matter of the present lawsuit was involved in said condemnation proceeding.

[fol. y] 5. Plaintiff admits the allegations in paragraph 5 of the defendant's fourth defense.

6. Plaintiff denies the allegations in paragraph 6 of defendant's fourth defense.

Reply to Fifth Defense

1. Plaintiff denies the allegations contained in paragraph 1 of defendant's fifth defense, except that Congress enacted Public Law 476 on July 6, 1954.

2. Plaintiff admits the allegations in paragraph 2 of defendant's fifth defense.

3. Plaintiff denies the allegations in paragraph 3 of defendant's fifth defense, except that the Act of July 6, 1954, directed the Secretary of the Army to transfer engineering data and other records as will be of value to the plaintiff.

4. Plaintiff denies the allegations in paragrph 4 of defendant's fifth defense, and alleges that the appropriation authorized by the Act of July 6, 1954, was a contribution by the United States for flood control benefits in the Markham Ferry project, that the Markham Ferry project is to be wholly owned by the Grand River Dam Authority.

5. The plaintiff denies all of the allegations in paragraph 5 of the defendant's fifth defense and asserts that said Act of July 6, 1954, has no application whatsoever to the issue involved in the present case. That said Act of July 6,

[fol. z] 1954, is applicable only to the Markham Ferry dam and reservoir project, and does not extend beyond the boundaries and limits of said Markham Ferry project in any respect.

Wherefore, the plaintiff demands judgment as prayed for in its petition.

Q. B. Boystun, General Counsel, L. Keith Smith, Special Counsel, Attorneys for Plaintiff.

[fol. 1] IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY, Plaintiff,

v.

THE UNITED STATES, Defendant

Tulsa, Oklahoma

Transcript of Trial Proceedings—January 13 and January 14, 1958—10 A.M.

The parties met, pursuant to Notice of the Commissioner, at the time above stated, in Room 319 Federal Building, Tulsa, Oklahoma.

Present: Hon. Mastin G. White, Commissioner; Q. B. Boydstun, Esq. and L. Keith Smith, Esq., counsel for the Plaintiff; and Herbert Pittle, Esq., counsel for the Defendant.

Laurence E. Lindsay, a reporter, was thereupon sworn by the Commissioner to well and truly take down and transcribe the questions propounded to and the answers given by the witnesses, and to do all other things required of him by the Commissioner.

OPENING STATEMENTS AND COMMISSIONER'S EXHIBIT 1

Mr. Boydstun: If the Court please, I guess we should make our apperances here—who represents whom.

The Commissioner: Yes. Will you so inform the reporter?

APPEARANCES

Mr. Boydstun: Mr. Reporter, appearing for the plain-
[fol. 2] tiff, the Grand River Dam Authority, are Q. B. Boydstun, general counsel for the Authority, and Mr. L. Keith Smith, special counsel for the Grand River Dam Authority.

The Commissioner: Will the Government enter its appearance?

Mr. Pittle: You have my name, do you, Mr. Reporter?

The Commissioner: The Court is now ready to proceed

with the trial of the case of the Grand River Dam Authority against the United States, No. 226-56.

Is the plaintiff ready to proceed?

Mr. Boydstun: We are ready.

The Commissioner: Is the defendant ready?

Mr. Pittle: Yes, we are ready, Your Honor.

The Commissioner: I wonder if the plaintiff would like to make an opening statement at this time?

Mr. Boydstun: If the Court please, I would like to make a brief statement—I assume the Commissioner is more or less familiar with the issues.

The Commissioner: I have read the pleadings.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Boydstun: This suit is by the Grand River Dam Authority, a public corporation, and an agency of the State of Oklahoma, against the United States.

The issues are as we allege in our petition, that the United States took certain property and property rights of the Grand River Dam Authority for the Government's [fol. 3] use in connection with its Fort Gibson Dam and Reservoir Power Project, on Grand River in Oklahoma, and that the Government has not compensated us for that property and the property rights which we allege and hope to prove that they have taken.

The property rights and property that we expect to prove that the Government has taken without paying just compensation for, is the Authority's exclusive license and franchise right to develop and generate electric power and energy at the Fort Gibson Dam site; that the Government has appropriated and made some additional use of the waters of Grand River for the production of electric power and energy at the Fort Gibson Dam site, and have not paid the Authority for that appropriation.

We expect to show that the Authority had these rights prior—long prior to the time that the Federal Government ever expressed any interest in the development of Grand River, which we expect to show is a non-navigable stream, and that all of the vested water rights—all of the State's water rights in and to Grand River were transferred to the Grand River Dam Authority by an act of the Oklahoma Legislature in 1935, and that no other agency of the

State had any control or jurisdiction over Grand River and the waters of Grand River after the 1935 act.

And I think at this time as I understand it, if the Court please, this matter has been by stipulation segregated into two parts—is that correct?

[fol. 4] The Commissioner: That's right, Mr. Boydstun; the parties, with the permission of the Commissioner have agreed that this trial will be limited to the issue of liability only; that will leave the question of damages, if any, to be determined in subsequent proceedings, if the Court should decide that the defendant is liable.

Mr. Boydstun: I take it at this time then it is not necessary for us to make any statement in connection with the amount of compensation that will be left for future trial.

The Commissioner: That's right; the question of the amount of damages will not be included in the present proceedings.

Mr. Boydstun: Then with this closing statement, it is our position that the Government obtained no right whatever from the State of Oklahoma; if they did obtain any rights from any Agency of the State of Oklahoma, that it was subject to the prior rights of the Grand River Dam Authority, and that taking property—such property should be compensated for under the Constitution.

The Commissioner: Mr. Pittle, do you wish to make a statement?

Opening Statement on Behalf of Defendant

Mr. Pittle: Yes, if the Court please. As Mr. Boydstun said, this is a suit for damages which plaintiff asserts amount to ten million dollars, representing just compensation for what it says also is the taking of those property [fol. 5] rights. These property rights are asserted in the petition to represent two items: First, the actual water in the Grand River which plaintiff says it owns exclusively and which it says the Government is making beneficial use of; and, secondly, the taking of the franchise of the Grand River Dam Authority by the Government.

Now as I understand the plaintiff's petition on that, the taking of the franchise is asserted to have occurred by reason of the generation of power by the United States at this Fort Gibson Dam, and selling it in competition with the plaintiff. In our answer we have set forth three defenses

which I won't go into in detail at this time except to point out one of them is based on estoppel, and the facts which will be obtained largely from documents, will show the factual basis for this defense.

We of course assert that the plaintiff's petition fails to state a claim for which relief can be granted—and this alleges merely a legal defense. The other defense is on the merits, and that is a denial of the assertion that we have taken anything that belongs to the plaintiff. The facts we believe will establish that we have not taken anything that belongs to the plaintiff; we haven't taken the plaintiff's water—assuming the plaintiff had an exclusive right to all of the water as it alleges, with which we don't agree—with which assertion we don't agree. We say as a factual [fol. 6] matter that the use of water which the Department of the Army in the operation of Fort Gibson Dam is making, is not a consumptive use of water, so that even if the plaintiff had the exclusive ownership of the waters in the Grand River, we are not using their water. We are using that water only after the plaintiff has voluntarily released it from its Pensacola Dam. After its release we would prove—the record will establish that we are not consuming that water; the Fort Gibson Dam is what is known as a run-of-the-river dam; it doesn't store ahead; it just uses water as it goes through the spillway. Our position on that briefly to summarize, is, plaintiff believes it is the owner of those waters; our position is, let them keep them; we use them only after they release them.

As to the taking of the franchise, our position there will be—I believe entirely legal. And that it will be based on the proposition which we will argue and brief at the appropriate time, that the plaintiff does not have any right to be free from competition; so that on the basis of several Supreme Court decisions our operation is not a taking—a compensable taking under the fifth amendment. I mentioned, during the—before this hearing began to Mr. Boydstun that upon my arrival here in Tulsa, the first opportunity I had had to make any field examination of documents and other matters which might be available. As a result of my examination I have come up with what I believe will [fol. 7] be two additional defenses which are not alleged in the answer, and I will therefore ask permission to put on

documentary evidence in support of these two defenses, subject to the Government's obtaining leave of Court to amend its petition—to amend its answer, assuming that these defenses not be specially pleaded. If you wish I can state now briefly what those defenses are.

The Commissioner: I think perhaps it might be helpful to have the statement in the record.

Mr. Pittle: All right, sir. The first matter arises out of a small condemnation case which was instituted by the United States sometime ago to acquire two relatively small tracts of land, which were owned by the Grand River Dam Authority. That case was Civil No. 2116, in the United States District Court for the Northern District of Oklahoma. The Federal Government filed a petition and condemned these tracts and named among others, the Grand River Dam Authority as a party defendant. The Grand River Dam Authority filed a motion to dismiss, which was overruled. It then filed a notice to vacate title of the United States, and to dismiss the lands designated as these tracts. That motion was filed on November 21, 1947. The motion, which is quite a lengthy one, presents as grounds for dismissal of the condemnation suit, some of the same matters upon which the plaintiff is relying for recovery in the present lawsuit.

[fol. 8] The motion remained pending on the docket for several years, until February 10, 1954, when the Grand River Dam authority filed an application for distribution of compensation in that case. Upon its application, compensation was awarded, subject, I believe, to the right to a jury trail as to the amount, but it requested and obtained the amount which was deposited under the declaration-of-taking procedure. It is our position that that constitutes a bar, or, res adjudicata, to the present claim, or portions of it, on the ground that the plaintiff is barred by resadjudicata, or split its cause of action.

The second matter of defense which I will want to raise is one arising out of legislation and proceedings had subsequent to the construction of the Pensacola Dam, and the Fort Gibson Dam, namely, with respect to Markham Ferry; Markham Ferry was the location for a third proposed dam which was to be constructed by either Grand River Dam Authority or the United States—that is not important at

this point; but the important fact is that the United States enacted legislation authorizing the Corps of Engineers to construct a dam at Markham Ferry. That legislation was subsequently amended by the Act of July 6, 1954, which authorized the Corps of Engineers and the department of the Army, and every other Government agency to cooperate with the Grand River Dam Authority in its construction of the dam at Markham Ferry. In other words, Congress deauthorized the construction of the dam at Markham Ferry by the United States, and appropriated $6,500,00 as a [fol. 9] monetary contribution of the United States to Grand River Dam authority for its construction of that dam.

Section 3 of the Act of July 6, 1954, asserts that the acceptance by the Grand River Dam Authority of the foregoing amount—that is, the $6,500,000—shall constitute an agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted, of whatever nature, including, but not limited to, acquisition of land, relocation, construction, operation, and maintenance of the dam and reservoir.

It will be our legal position that while facts up to this present moment may show that Grand River Dam Authority has not received the $6,500,000, it has received approximately three million dollars worth of engineering plans and designs, which were prepared by the—I am sorry,—$300,000—which were prepared by the Corps of Engineers and which were turned over to it as directed by other provisions of this Act, and that this constitutes a bar to the present action.

Thank you.

The Commissioner: Well, I think that we will permit the plaintiff to state its position with respect to these matters whenever the defendant during the course of the trial offers the evidence in support of these additional defenses, which the defendant says are pertinent to the present case.

(Thereupon at the direction of the Commissioner, con- [fol. 10] versation was had off the record and thereafter the following proceedings were had on the record:)

The Commissioner: The record should show at this point I think that the parties during the course of the pretrial

proceeding under Rule 28(b) of the Court of Claims, have agreed upon certain facts as true. In that connection however the plaintiff has indicated that certain of these facts, although true, are inadmissible from its standpoint.

Now I have had prepared a typewritten statement of these various facts that the parties have agreed upon as true, and the various portions of the statement to which the plaintiff objects, insofar as admissibility is concerned, have been checked with red.

At the present time I am going to have the reporter mark them for identification as Commissioner's Exhibit No. 1, this statement of the facts agreed upon by the parties as true, pursuant to the pretrial proceedings under Rule 28(b).

(Instrument identified as Commissioner's Exhibit 1.)

The Commissioner: I have previously furnished to the attorneys for both sides copies of this exhibit and it might be appropriate at this time to permit the plaintiff to state its objections to the particular portions of the statement which it regards as inadmissible.

Mr. Boydstun: Well, I believe the first statement, Mr. Commissioner, is to the number designated as Item No. 4, [fol. 11] which is the first red pencil mark that appears——

The Commissioner: Well, I believe that there should be a mark at No. 2.

Mr. Boydstun: Oh, yes, yes, —I am not seeing good here —yes.

Well, we admit that the exhibit or the statement is factually true. But our objections to it are that it is immaterial, incompetent and irrelevant to prove or disprove any issues in the case. Because that was a public hearing held by the Corps of Engineers in which the public was invited to make various statements; and I don't believe that it is—our position is that it does not prove or disprove any of the issues in the lawsuit.

And then I believe No. 3 is probably the next one, in which we do not question the authenticity of that statement, but for the same reason we do not think it is admissible as—for the same reason as to No. 2.

No. 4 sets out certain statements made by the Chairman of the Grand River Dam Authority—Chairman of the Board of Directors of the Grand River Dam Authority at this

meeting. We admit the authenticity of the statements but it is our contention that the statements do not grant, or acquiesce, or give any consent of the plaintiff, Authority, for the taking or using of the waters, or infringes on the rights on Grand River that the Authority held at that time. [fol. 12] The Board of Directors of the Grand River Dam Authority is the governing body, as fixed by statute, and the only action that the Authority can take is by a majority of the Board of Directors of the Authority. And it is our contention that that was never done, either before, or it wasn't ratified after. And that the—well, I started to say, that the allegations of the Government, that the Government made that we did transfer certain easements to—I believe that is in some other paragraph—so we contend that this is inadmissible because the statements of the Chairman of the Board of Directors is not binding on the Authority unless the Board of Directors has authorized it or approved it.

Number 5, we admit the authenticity of that statement, but it is our contention that any statement made by the Planning and Resources—the Oklahoma Planning and Resources Board, or any officer thereof, after 1935, relative to granting permits or granting any rights for the development and use of the waters of Grand River was of no force and effect because the Planning and Resources Board had no jurisdiction over Grand River after the GRDA Act of 1935. And this statement also sets out or indicates to me that the statement of the Planning Board was giving notice, to the Government, that the Grand River Dam Authority had been created, and superimposed upon the Grand River in Oklahoma. And we think that it has no force or [fol. 13] effect. And did not grant any rights. I believe the next one—or is that all of them—No. 9, on page 4; we think that is inadmissible for the same reason as set forth in No. 5 above.

We object to the admissibility of 9 and 10 for the same reasons that we object to No. 5 above, and I believe all the rest of them are—there is no controversy about.

The Commissioner: Thank you, Mr. Boydstun. I notice on page 5 that there are a couple of typographical errors which I have corrected in the original of the exhibit. In the second line on page 5 the word "grant," should be "grand"; and the same is true in the sixth line from the bottom of the

page. It seems to me that the Court ought to have a very full record here with respect to the background relating to the relationship of the parties in connection with the development of the water resources of the Grand River. Hence I shall now overrule the plaintiff's objections to certain portions of Commissioner's Exhibit No. 1, and receive in evidence that exhibit, as Commissioner's Exhibit No. 1.

Mr. Boydstun: If the Court please—pardon me—but there is another typographical error; it may be my fault; at the top of page 4, where it says "eighty thousand kilowatts" I think that should be sixty—sixty thousand, where it says eighty.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: I believe that is probably correct.

[fol. 13.1] The Commissioner: All right, we will correct, then, the first line on page 4 by substituting "60,000" for "80,000."

[fol. 14] DOCUMENTARY EVIDENCE FOR PLAINTIFF

The Commissioner: The parties have also informed each other with respect to at least some of the exhibits that they intend to offer at the trial. I think that in the interest of orderly procedure we might now mark the exhibits that the parties intend to offer, including any additional ones besides those previously referred to in the exchange of correspondence.

We will first mark the plaintiff's Exhibits, Mr. Boydstun. Just tell the reporter what each one is and I will assign him a number.

Mr. Boydstun: Okay, Mr. Commissioner, I think I will follow the order in which we presented them in the pretrial conference.

The Commissioner: Very well.

Mr. Boydstun: The first offer is a judgment of the District Court of Mayes County, Oklahoma, in case No. 5263, City of Tulsa, a municipal corporation, plaintiff, versus Grand-Hydro, and others, defendants.

The Commissioner: You may give the date of the judgment, Mr. Boystun.

Mr. Boydstun: On the 10th day of February, 1938.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 1.

[fol. 15] (In every instance where the Commissioner directs that an exhibit be given a certain number, that exhibit is by the reporter given that number.)

Mr. Pittle: Excuse me a moment, Mr. Boydstun.

Do you wish us to make objections to these as they go along, Commissioner, or——

The Commissioner: In the case of plaintiff's exhibits, I have seen at least eight of them, and I will wait and hear the defendant's objections to those eight, in bulk.

Mr. Pittle: All right.

The Commissioner: And perhaps as to the others as well.

Mr. Boydstun: Next is a memorandum to R. V. L. Wright, the General Manager of the Grand River Dam Authority, from Holway & Neuffer, Engineers, dated July 30, 1938.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 2.

Now I was wondering about the identity of Mr. Wright. Is it conceded by the defendant that he is or was the general manager of the Grand River Dam Authority at that time, Mr. Pittle?

Mr. Pittle: I have no independent information about that date. I am willing to take plaintiff's counsels' assertion that he was.

The Commissioner: All right. Thank you.

[fol. 16] Mr. Boyd: The next is an excerpt of the minutes of the recessed meeting of the Board of Directors of the Grand River Dam Authority held on the 6th day of June, 1939, at Vinita, Oklahoma, showing resolution No. 273, authorizing the construction of a transmission line from the Pensacola Dam to the vicinity of the Fort Gibson Dam.

The Commissioner: That will be marked for identification as Plaintiff's Exhibit 3.

Mr. Boydstun: The next, the excerpts of the minutes of a recessed meeting of the Board of Directors of the Grand River Dam Authority held at Vinita, Oklahoma, on the 25th day of July, 1939, showing resolution No. 315, authorizing the construction of the Markham Ferry substation and switching station, and for the acquisition of the necessary lands.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 4.

Mr. Boydstun: Next is a letter dated March 2nd, 1940, from H. A. Montgomery, Captain, Corps of Engineers, District Engineer, Tulsa, Oklahoma, to Holway & Neuffer, relating to the furnishing of certain data pertaining to the Fort Gibson project.

The Commissioner: That document will be marked for identification as Plaintiff's Exhibit No. 5.

Mr. Boydstun: Next excerpts of the minutes of a recessed meeting of the Board of Directors of the Grand [fol. 17] River Dam Authority held at Vinita, Oklahoma, on the 9th day of July, 1940, showing that the plaintiff authorized its engineers, Holway and Neuffer, to proceed with the further engineering in connection with the construction of the Markham Ferry and Fort Gibson Dams.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 6.

Mr. Boydstun: Next is a statement of the Grand River Dam Authority filed with the Corps of Engineers at a public hearing held in Tulsa, Oklahoma, on the 4th day of May, 1945.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 7.

Mr. Boydstun: Next, a letter from France Paris, General Manager of the Grand River Dam Authority, to the Chief of Engineers, Corps of Engineers, Washington, D. C., dated February 14, 1946.

The Commissioner: That document will be marked for identification as Plaintiff's Exhibit No. 8.

Mr. Boydstun: Mr. Commissioner, that concludes the exhibits that we have submitted in the pretrial. Now we have some others that we would like to offer at the proper time.

The Commissioner: Do you prefer to have them marked now or would you rather wait?

Mr. Boydstun: I think we had just as well go ahead and mark them now.

[fol. 18] The Commissioner: I suppose we had. All right; suppose we do that.

Mr. Boydstun: First we would like to offer a general outline map which is attached to the plaintiff's petition as Exhibit A.

The Commissioner: As of what time was this map prepared—if that is important?

Mr. Boydstun: Well, I would have to ask Mr. Holway; I think it was back about 1940.

Mr. Holway: The original was prepared in 1939.

The Commissioner: Mr. Pittle, are you familiar with the date of the preparation of this map?

Mr. Pittle: I am trying to find that out just now.

The Commissioner: All right. Well, in the meantime we will mark the map for identification as Plaintiff's Exhibit No. 9.

Mr. Boydstun: If the Court please, this next item here I would like to maybe make a statement. The Oklahoma Legislature in 1939 amended the Grand River Dam Authority Act of 1935 in the '39 amendment, they specifically authorized the construction of the Fort Gibson Dam together with the Markham Ferry Dam and appropriated, or authorized the issuance of a definite amount of money for the construction of those projects. The only place that that—the Act has been amended later. The only place you can find it is to pick up a copy of the Oklahoma Ses-[fol. 19] sion Laws which I think the Court will take judicial notice of, but for convenience I was going to offer that section of the statute as an exhibit—of that session law.

The Commissioner: Very well, we will mark this as Plaintiff's Exhibit——

Mr. Boydstun: I will have to read that to you, I expect, Mr. Commissioner. I see I failed to bring my copy. It is a short excerpt.

The Commissioner: All right, suppose then, subject to verification, we have Mr. Boydstun read into the record at this point the pertinent statutory provision.

Mr. Pittle: Would you identify that also?

Mr. Boydstun: Yes, I will identify it. That portion of article 3 of chapter 70, Oklahoma Session Laws of 1939, at page 560, as follows: "Provided that an amount of such bonds in the aggregate sum of $10,000,000 is authorized to enable the construction of dams at Markham's Ferry, and Fort Gibson, and transmission lines at or near the location sites of said dams, as shown in document 107 of the first session of the Seventy-Sixth Congress".

The Commissioner: All right, that is admitted in evidence subject to verification.

Mr. Boydstun: The next that we would like to offer would be a copy of the loan and grant agreement between [fol. 20] the United States of America and the Grand River Dam Authority dated October 16, 1937.

The Commissioner: This document will be marked for identification as Plaintiff's Exhibit No. 10. Will you hand it to the reporter, please?

Mr. Boydstun: Next we would like to offer copies of correspondence between the Grand River Dam Authority and the Corps of Engineers, Tulsa office. This offer consists of several letters here.

The Commissioner: Give the dates of the letters if you will, Mr. Boydstun.

Mr. Boydstun: A letter dated October 13, 1952.

The Commissioner: From whom to whom; who are the parties involved?

Mr. Boydstun: From Robert F. Hunter, Chief of Operations, to Q. B. Boydstun, general counsel for the Authority.

The Commissioner: I think we will mark that particular letter as Plaintiff's Exhibit 11-A.

Mr. Boydstun: And then a copy of a letter from me to the District Engineer, dated January 13, 1953.

The Commissioner: That will be marked Plaintiff's Exhibit 11-B, for identification.

Mr. Boydstun: And a letter dated January 7, 1953, from the Attorney General of the State of Oklahoma, to Q. B. [fol. 21] Boydstun, general counsel.

The Comissioner: That letter will be marked 11-C, for identification.

Mr. Boydstun: A letter dated January 19, 1953, from E. G. Herb, Colonel, District Engineer, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Exhibit 11-D, for identification.

Mr. Boydstun: A letter of December 2nd, 1953, from France Paris, General Manager of the Authority, to the Corps of Engineers, Tulsa, Oklahoma.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-E, for identification.

Mr. Boydstun: A letter dated March 8, 1954, from Q. B. Boydstun, general counsel of the Authority, to Mr. Robert Hunter, Corps of Engineers, Tulsa.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-F, for identification.

Mr. Boydstun: A letter dated March 11, 1954, from Stanley G. Reiff, District Engineer, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Plaintiff's Exhibit 11-G, for identification.

Mr. Boydstun: A letter dated March 30, 1954, from Q. B. Boydstun, general counsel, to Colonel Stanley G. Reiff. [fol. 22] The Commissioner: It will be marked Plaintiff's Exhibit 11-H, for identification.

Mr. Boydstun: A letter dated April 6, 1954, from Robert F. Hunter, to Q. B. Boydstun, general counsel.

The Commissioner: It will be marked Plaintiff's Exhibit 11-I, for identification.

Mr. Boydstun: A letter dated February 3, 1956, from W. J. Himes, Colonel, to Q. B. Boydstun, general counsel.

The Commissioner: That letter will be marked Plaintiff's Exhibit 11-J, for identification.

Mr. Boydstun: Next we would like to offer an excerpt from House Document No. 308, Sixty-Ninth Congress, first session, Volume 3, pages 1260 and 1261. Date of the matter referred to therein, or the excerpt, is June 19,—dated June 19, 1931. We offer a photostatic copy.

The Commissioner: That document will be marked for identification for Plaintiff's Exhibit No. 12.

Mr. Boydstun: Next we wish to offer an excerpt from House Document 308, Seventy-Fourth Congress, first session, Volume 1, page 4, paragraph 11, dated July 26, 1935, and in part—I don't have that copied, Mr. Comissioner, but I can read it into the record; it is just a very short quote.

The Commissioner: All right, we will permit you to read it into the record, Mr. Boydstun, then we will act on it.

Mr. Boydstun: "The State of Oklahoma has enacted [fol. 23] legislation creating the Grand River Dam Authority for the development of hydroelectric power on Grand River."

The Commissioner: Mr. Pittle, have you any objection to that statement being received in evidence?

Mr. Pittle: No, sir.

The Commissioner: Very well, that is admitted.

Mr. Boydstun: Then we have a certificate of lack of record; this certificate of Andrew I. Rohmiller——

The Commissioner: Will you spell the name for the reporter.

Mr. Boydstun: Andrew I. R-o-h-m-i-l-l-e-r, the Secretary of the Grand River Dam Authority——

The Commissioner: Just state generally what it relates to.

Mr. Boydstun: He certifies that he is the custodian of all the official records of the Authority and that on diligent search of all records of the Authority he fails to find any authorization authorizing George Shaefer as Chairman of the Board of Directors to make the statement on June 7, 1937, as alleged in the defendant's answer.

The Commissioner: Well, that document will be marked for identification as Plaintiff's Exhibit No. 13.

Mr. Boydstun: I assume, if the Court please, that we—it will be taken that I offered this in evidence—collectively, if I did not make that a part of the record as I went along [fol. 24] I would like to now offer all of the exhibits.

The Commissioner: That will be noted, Mr. Boydstun.

Now, Mr. Pittle, I notice you had copies of the first eight exhibits that we have marked for identification. Are you sufficiently familiar with the exhibits that we have marked for identification, from 9 through 13, to state your position with respect to them at this time?

Mr. Pittle: Probably not entirely, sir.

The Commissioner: Well, suppose then we hear you with respect to the first eight exhibits and then we will let you reserve your objections and of course I will reserve my ruling, with respect to the others until a later time in the trial.

Mr. Pittle: Defendant objects to the Plaintiff's Exhibit No. 1 for identification, being the copy of the decree in the case which is identified in the exhibit on the ground that it is incompetent to prove the fact that it seeks to prove, being a suit between plaintiff and another party, and a suit to which United States was not a party, and that it is irrelevant and immaterial for the purposes for which it is offered. We do not question its authenticity.

The Commissioner: It is my understanding that the de-

fendant does not have any objection on the ground of authenticity to any of the first eight exhibits.

Mr. Pittle: No—I may make that statement generally, [fol. 25] that is correct.

The Plaintiff's Exhibits 2 to 6, inclusive, we will object to those for the same reasons that are set forth in our letter of April 4, 1957, to Mr. Boydstun under proceedings in conformity with Rule 28.

The Commissioner: You may state if you will for the record——

Mr. Pittle: That objection is that the purpose for which those documents have been offered, assuming the purpose is the same as represented during the time, Rule 28 proceedings were going on, is immaterial and irrelevant to the present action.

As to Plaintiff's Exhibit No. 7, we would object to that on the ground of materiality and relevancy. We say it is incompetent to prove that the plaintiff asserted a claim prior to the construction of the Fort Gibson project—I am sorry, I misstated that; we assert that it is incompetent to prove that the plaintiff, having asserted a claim prior to the Fort Gibson project, can prove by that document that the Government failed to acquire the rights which the plaintiff now says it should be reimbursed for. And as to Plaintiff's Exhibit 8, we object to that for the same reasons as we have objected to No. 7,— and those are the first eight.

On Plaintiff's Exhibit 9, that was a general outline map prepared by plaintiff's engineers; we have not been able [fol. 26] to find a date on it or determine its authenticity otherwise. Insofar as it will show the same physical matter as shown on Government maps, we would of course have no objection. Insofar as it may show any data, if that becomes material, we would reserve our objection to affirmatively prove or disprove such variances.

The Commissioner: Well now how long do you think it would take you to check it against the Government maps for the purpose of verification?

Mr. Pittle: It will probably take a day or so, or, I would suggest that we might be able to do that, even if this proceeding should end before that has been done—that we take care of it subsequently.

The Commissioner: All right, suppose we pass on then.

Mr. Pittle: As to Plaintiff's Exhibit 10, which was an excerpt from the session laws of Oklahoma, we recognize the court of course can take judicial notice of it—of the session laws—I assume.

The Commissioner: I don't believe that is the number of the session laws. I believe that the section of the session laws, Mr. Boydstun merely read them into the record.

Mr. Pittle: That wasn't given a number then?

The Commissioner: No.

Mr. Pittle: Then I'm not being asked to make any ob-
[fol. 27] jection or agreement?

The Commissioner: Well, I said, subject to verification I would receive it in evidence, and as I don't hear any objection—if you wish to make an objection I will cancel my previous admission of the matter in evidence and then reconsider it.

Mr. Pittle: Well, we do not object to the authenticity of the statement because that is subject to verification. Our objection would be a formal one for the record only, that the Oklahoma session law insofar as it might conflict with any other law or Act of Congress would not be binding upon the United States in this matter.

The Commissioner: Well, that objection will be overruled, and we will re-admit in evidence the excerpt which has previously been read into the record.

Mr. Pittle: Plaintiff's Exhibit 10 we have no objection to.

The Commissioner: In the absence of objection then Plaintiff's Exhibit No. 10 is admitted in evidence.

Mr. Pittle: As to the Plaintiff's Exhibit No. 11, we do not object to the authenticity of any of the documents in that correspondence; we don't object to it for any other grounds except insofar as it may—if the purpose may be to constitute any admissions on the part of the Government, we reserve our right to rebut any contention.

[fol. 28] The Commissioner: Well, certainly you would have the right to rebut any of the statements in there; and subject to that then you are agreeable to having these various letters or copies of letters received in evidence?

Mr. Pittle: Yes, sir.

The Commissioner: Very well.

Mr. Pittle: We just didn't want our position to be ques-

tioned, having admitted these in evidence, and then be stopped from contradicting anything that may be argued constituting admissions.

The Commissioner: All right, you may certainly reserve your right to put on contradictory evidence with respect to any of the statements contained in these letters. With that reservation then of the right of rebuttal on the part of the defendant I will now receive in evidence the ten letters or copies of letters, previously marked for identification as Plaintiff's Exhibits 11-A through 11-J, inclusive.

Mr. Pittle: Now, Plaintiff's Exhibit 12 was an excerpt from House Document 308, is that correct,—Sixty-Ninth Congress, first session.

We have no objection to that. We would ask the Court however to take judicial notice of the entire document, if any other provisions of it become material in this case.

The Commissioner: That would be appropriate. Without objection then the document marked for identification as [fol. 29] Plaintiff's Exhibit 12 is admitted in evidence.

Mr. Pittle: To Plaintiff's Exhibit 13, the certificate of lack of record, we do not object.

The Commissioner: Without objection that document is admitted in evidence as Plaintiff's Exhibit No. 13.

Now with respect to the first eight exhibits, I might state for the record that Plaintiff's counsel furnished copies of those exhibits to me sometime ago during the course of the pretrial proceedings under Rule 28(b) and I have examined each of them prior to the trial. In line with my statement a few minutes ago to the effect that I believe we ought to have in the record all of the pertinent information bearing upon the relationship of the parties in connection with the development of the water resources of the Grand River and also pertinent material bearing on the positions taken by the parties in the past, I am going to overrule the defendant's objections and admit in evidence the exhibits previously marked for identification as Plaintiff's Exhibits 1 through 8, inclusive.

Now they are admitted for the purpose of showing decisions taken in the different documents and of showing what was done at the various times indicated therein. As far as factual statements set out in the documents are

concerned, they are not considered as evidence in this case to prove the truth of the statements of fact made in them, [fol. 30] and to illustrate, I might just pick out Plaintiff's Exhibit No. 1, that being a decree previously entered by a State Court in Oklahoma. Now I am admitting that for the purpose of showing what the Court held with respect to the right of the plaintiffs in the waters of the Grand River and not for the purpose of establishing the proof of the various factual statements made by the Court in that case. I believe that the meat of the exhibit insofar as its admissibility is concerned is found in paragraph 18 I think—I don't have a copy before me—may I see it, Mr. Reporter?

Yes, I think the basic portion that I regard as significant in this case is set out in paragraph 18 of this exhibit; in other words I am showing what—admitting this document for the purpose of showing what the Court held with respect to the rights of the plaintiff.

Now as to Plaintiff's Exhibit No. 9 for identification, I don't believe that there has been sufficient predicate laid as yet for its admission in evidence since the Government hasn't had an opportunity thus far to verify it as to accuracy, and so forth. I will merely delay a ruling on Plaintiff's Exhibit No. 9 at this time.

Mr. Boydstun: Mr. Commissioner, if I may interrupt a second here, I might clarify—the purpose of that exhibit 9 is not for any particular factual information that may appear on it, but the only purpose is to show the general [fol. 31] plans of the Authority for the development of the entire Grand River—that is the extent of our—that is the purpose for which we want to use it, just for an outline. As far as any factual information on there, we didn't intend to show anything other than what the over-all comprehensive plan was.

The Commissioner: As of what time, Mr. Boydstun?

Mr. Boydstun: About 1939, I believe; we will show that by Mr. Holway.

The Commissioner: Mr. Pittle, I don't know whether you heard Mr. Boydstun's explanation, that he is offering this exhibit for the purpose of showing what the plaintiff's plan was as of 1939 with respect to the development of the Grand River.

Mr. Pittle: Well, for that limited purpose we have no objection except as to the date 1939. That may be material and we would reserve our offer to admit it—or our consent to its admission—

The Commissioner: Yes.

Mr. Pittle: We may do so with the understanding that it does not constitute an admission that as early as 1939 the plaintiff had the plan which it now says this document would show.

The Commissioner: I think then we had better wait on Plaintiff's Exhibit No. 9 for identification; Mr. Pittle, [fol. 32] would you like to have the defendant's exhibits marked at the present time?

Mr. Pittle: Yes, I would, Your Honor; and it is going to take a little while, and I wonder if we might have about five minutes before I start.

The Commissioner: Certainly. We will have a ten minute recess at this time.

[fol. 33] DOCUMENTARY EVIDENCE FOR DEFENDANT

The Commissioner: All right, Mr. Pittle, we will now mark the defendant's exhibits for identification.

Mr. Pittle: If the Court please, the defendant offers for identification, and asks the reporter to mark as our first exhibit the entire transcript of the public hearing for reservoirs in the Grand River.

The Commissioner: That will be marked for identification as Defendant's Exhibit No. 1.

Mr. Pittle: As Defendant's Exhibit 2 for identification we offer project data for the Pensacola Reservoir.

The Commissioner: It will be so marked for identification.

Mr. Pittle: As Defendant's Exhibit No. 3 for identification we offer data concerning the Pensacola Reservoir and its effect on Fort Gibson Reservoir.

The Commissioner: It will be so marked for identification.

Mr. Pittle: As Defendant's Exhibit 4 we offer completion data for Pensacola Reservoir, dated September 1935.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 4.

Mr. Pittle: As Defendant's Exhibit No. 5, we offer the order of the Federal Power Commission relative to cost of Pensacola Reservoir, et cetera—a very long title, iden-
[fol. 34] tified as Project 1494.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 5.

Mr. Pittle: As Defendant's Exhibit No. 6, we offer the order of the Secretary of the Interior, dated September 1, 1943, and executive orders 9366 and 9373. Parenthetically I might remark that executive orders of course may be taken judicial notice of, but for convenience, we have copies——

The Commissioner: These three documents will be marked for identification respectively as Defendant's Exhibits 6-A, 6-B, and 6-C.

Mr. Pittle: Now as Defendant's Exhibits No. 7, we offer a copy of the transcript of public hearing of Fort Gibson Reservoir on Grand River, held January 27, 1942.

The Commissioner: It will be marked for identification as Defendant's Exhibit 7.

Mr. Pittle: As Defendant's Exhibit 8, we offer a letter from the Chief of Engineers, to the Grand River Dam Authority dated January 6th, 1944.

The Commissioner: This letter will be marked for identification as Defendant's Exhibit 8.

Mr. Pittle: Now as Defendant's Exhibit No. 9, we offer a letter to the Grand River Dam Authority from the Chief of Engineers, letter being dated March 11, 1946.

The Commissioner: That letter will be marked for iden-
[fol. 35] tification as Defendant's Exhibit No. 9.

Mr. Boydstun, am I correct in my impression that the plaintiff has previously indicated that it has no objection to the document that we just marked for identification as Defendant's Exhibit No. 8, as being a letter from the Chief of Engineers to the Grand River Dam Authority, dated January 6, 1944.

Mr. Boydstun: On January 6, 1944?

The Commissioner: Yes, sir. It is on page 5 of one of your letters to the Department of Justice.

Mr. Boydstun: Mr. Pittle, is that that letter about that water down there at the Oklahoma Ordnance Works?

We have no objection to the authenticity of it; we just—I think we objected to it as not material to the issues.

The Commissioner: Well, we will pass on then; and I will afford the plaintiff an opportunity to state its position with respect to all of these exhibits.

Mr. Pittle: So the record may be complete, if the Commissioner please, I could remark at this time that Defendant's Exhibit No. 9 is the same as Plaintiff's Exhibit No. 8, I believe, except that we have with it attached to the letter to the Grand River Dam Authority, the endorsements and other documents which are self-evident.

The Commissioner: Well, they will all be considered as [fol. 36] a part of Defendant's Exhibit 8—oh, we just marked one as Defendant's Exhibit 9—oh, you are saying that Defendant's Exhibit No. 9 for identification is the same as Plaintiff's Exhibit No. 8, is that correct?

Mr. Pittle: In part.

The Commissioner: All right, that will be noted.

Mr. Pittle: Now as Defendant's Exhibit No. 10, we offer the report containing pertinent data on the Fort Gibson Dam and Reservoir project, dated June 1946, revised August, 1946.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 10.

Mr. Pittle: As Defendant's Exhibit No. 11, we offer completion data pertaining to Fort Gibson Dam and Reservoir, dated September 1955.

The Commissioner: This will be marked for identification as Defendant's Exhibit No. 11.

Mr. Pittle: As Defendant's Exhibit No. 12, we offer a copy of the contract for flowage easement, and conveyance of right-of-way entered into February 6, 1950.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 12.

Mr. Pittle: As Defendant's Exhibit No. 13, we offer the petition of the Grand River Dam Authority for an order determining and fixing charges to be paid to it for benefit [fol. 37] of storage and head water improvements at the Pensacola River—Pensacola power project, before the Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 13.

Mr. Pittle: As Defendant's Exhibit No. 14 we offer a letter dated March 17, 1953, from the Corps of Engineers to the Division Engineer, together with a number of endorsements.

The Commissioner: Well, this letter together with the endorsements will be marked for identification as Defendant's Exhibit No. 14.

Mr. Pittle: As Defendant's Exhibit No. 15, we offer copies of correspondence relating to the head water benefits to Fort Gibson Reservoir derived from the Pensacola Reservoir.

The Commissioner: Suppose you indicate the dates of the correspondence, the persons who wrote the various letters, and the addressees.

Mr. Pittle: All right, the first is a memorandum of May 12, 1954, to the Division Engineer from the Corps of Engineers.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 15-A.

Mr. Pittle: And the first endorsement dated—the endorsement doesn't appear to have a date.

The Commissioner: Well,——

[fol. 38] Mr. Pittle: It is from the Assistant Division Engineer, Ray, the subject being the memo of 12 May '54.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 15-B.

Mr. Pittle: The next is the second endorsement dated July 16, 1954, to the Division Engineer, from the District Engineer.

The Commissioner: The second endorsement will be marked for identification as Defendant's Exhibit 15-C.

Mr. Pittle: The third endorsement dated October 6, 1954, to the District Engineer from the Assistant Division Engineer.

The Commissioner: This endorsement will be marked for identification as Defendant's Exhibit 15-D.

Mr. Pittle: And the fourth endorsement dated April 18, 1955, to the Division Engineer from the District Engineer.

The Commissioner: The fourth endorsement will be marked for identification as Defendant's Exhibit 15-E.

Mr. Pittle: And the fifth endorsement dated May 2, 1955,

to the Corps of Engineers from the Assistant Division Engineer.

The Commissioner: The fifth endorsement will be marked for identification as Defendant's Exhibit 15-F.

Mr. Pittle: Now as Defendant's Exhibit 16-A, I offer a copy of the motion to vacate title and to dismiss, et cetera, [fol. 39] filed by the Grand River Dam Authority, November 21, 1947, in the case entitled, United States of America, versus 1031.15 acres of land, more or less, situate in Mayes County, Oklahoma, and Ray Bonella Grand River Dam Authority, et al., No. 2116 Civil.

The Commissioner: That will be marked for identification as Defendant's Exhibit 16-A.

Mr. Pittle: And as Defendant's Exhibit 16-B, I offer a copy of the application for distribution of compensation filed in the proceedings.

The Commissioner: That document will be marked for identification as Defendant's Exhibit 16-B.

Mr. Pittle: As Defendant's Exhibit 17, I offer a copy of an order authorizing the issuance of a license on project No. 1494, upon the application of the Grand River Dam Authority, and it is dated January 27, 1939.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 17.

Mr. Pittle: As Defendant's Exhibit 18 I offer a copy of the license effecting navigable waters and reservations of the United States, project No. 1494, issued by Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 18.

Mr. Pittle: As Defendant's Exhibit 19, I offer a copy [fol. 40] of a letter dated October 5, 1940, to the Chief of Engineers from the Secretary of the Federal Power Commission, together with endorsements.

The Commissioner: These documents will be marked for identification collectively as Defendant's Exhibit 19.

Mr. Pittle: As Defendant's Exhibit 20, I offer a copy of an order dehying application for amendment of license, on project 1494, on the application of Grand River Dam Authority, the order being dated February 19, 1941, issued by the Federal Power Commission.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 20.

Mr. Pittle: As Defendant's Exhibit 21 I offer a copy of a letter dated July 1, 1941, from Chief of Engineers to the Chairman of the Federal Power Commission.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 21.

Mr. Pittle: As Defendant's Exhibit 22 I offer a copy of a letter dated May 18, 1942, from the Secretary of the Federal Power Commission to the general counsel of the Grand River Dam Authority.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 22.

Mr. Pittle: As Defendant's Exhibit 23 I offer a copy of a memorandum dated September 13, 1943, to the chief [fol. 41] of Engineers from the District Eningeer relating to the rules and regulations for the operation of Pensacola Dam.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 23.

Mr. Pittle: As Defendant's Exhibit 24, I offer a copy of a letter dated January 10, 1944, from the acting Chief of Engineers to Hon. Victor Wickersham.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 24.

Mr. Pittle: I want to offer as 24-A——

The Commission: The document that Mr. Pittle has just mentioned then will be marked for identification as Defendant's Exhibit 24-A.

Mr. Pittle: And as Defendant's Exhibit 24-B, I offer copy of excerpts from the testimony of Douglas G. Wright before the Flood Control Committee of the House of Representatives on June 8, 1943.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 24-B.

Mr. Pittle: And as Defendant's Exhibit 24-C a copy of a letter of December 22, 1943, from the general counsel of the Grand River Dam Authority to Hon. Victor Wickersham.

The Commissioner: It will be marked for identification as Defendant's Exhibit 24-C.

Mr. Pittle: As Defendant's Exhibit 24-D, I offer a copy [fol. 42] of a letter dated December 18, 1943, from the

general counsel of the Grand River Dam Authority to Hon. Bennett C. Clark, together with an excerpt of a press release dated December 17.

The Commissioner: These two documents will together be marked for identification as Defendant's Exhibit 24-D.

Mr. Pittle: As Defendant's Exhibit 25, I offer a copy of a letter dated March 17, 1944, from Douglas G. Wright, Administrator, Southwestern Power Administration, to the District Engineer.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 25.

Mr. Pittle: As Defendant's Exhibit No. 26, an order dismissing application for preliminary permit, issued by the Federal Power Commission in the matter of Grand River Dam Authority, and it is dated January 18, 1949.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 26.

Mr. Pittle: Defendant's Exhibit No. 27 is a copy of a letter dated August 12, 1954, from the general counsel of the Grand River Dam Authority to the Secretary of the Federal Power Commission.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 27.

Mr. Pittle: Defendant's Exhibit No. 28 is a copy of [fol. 43] an order issuing a license, on project No. 2183, in the matter of the Grand River Dam Authority, issued by the Federal Power Commission on June 22nd, 1955.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 28.

Mr. Pittle: As Defendant's Exhibit No. 29, I offer a copy of the Form L-4 issued by the Federal Power Commission entitled, Terms and Conditions of License for Unconstructed Major Project Effecting Navigable Waters of the United States.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 29.

Mr. Pittle: As Defendant's Exhibit No. 30, copy of an order amending order issuing license, in project No. 2183, issued December 13, 1954.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 30.

Mr. Pittle: As Defendant's Exhibit No. 31, a copy of an order amending order issuing license, in project

No. 2183, issued March 22, 1957, by the Federal Power Commission.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 31.

Mr. Pittle: Now, if the Court please, as part of our evidence in the case we will be asking the Court to take judicial notice of State statutes which may be pertinent. I have never been satisfied in my own mind whether it is necessary [fol. 44] to ask the Court to take judicial notice of Federal Statutes, but if it is, I am doing it now.

The Commissioner: Very well.

Mr. Pittle: In that connection I will offer for convenience a copy of the Act of July 6, 1954.

The Commissioner: Mr. Boydstun, do you object to this being received in evidence subject to verification?

Mr. Boydstun: Do you mean the enfire—all of his exhibits?

The Commissioner: Well, no, the one he is talking about.

Mr. Boydstun: No objection to it; that is a copy.

The Commissioner: All right this statutory provision will be admitted in evidence as Defendant's Exhibit 32.

Mr. Pittle: As Defendant's Exhibit 33, a copy of a letter from Robert S. Kerr, then Governor of Oklahoma, to the Chief of Engineers, which is published in House Doc. No. 758, 79th Congress, second sess., on page 10—that is Roman X—page X.

The Commissioner: This document will be marked for identification as Defendant's Exhibit 33.

Mr. Pittle: If the Court please, there is one other matter which I haven't been able to complete investigation on. I can state it briefly, and perhaps Mr. Boydstun can clear it up in a moment.

[fol. 45] While the present action was pending in the Court of Claims, the Grand River Dam Authority prosecuted an appeal from the Federal Power Commission's order denying an assessment for head water benefits at Pensacola. That appeal was taken to the Court of Appeals—United States Court of Appeals for the Tenth Circuit. The Court affirmed the order of the Federal Power Commission in denying the assessment, in its opinion which is dated July 12, 1957. I dont have the citation of it; I would offer the opinion for convenience—a copy

of it for convenience as an exhibit and I will call upon the plaintiff at this time to tell us w' ether Grand River Dam Authority has pending an application or petition for certiorari, or any other court proceedings because if they do, I would certainly move to dismiss the present action on the ground tha' another claim is pending.

The Commissioner: Well, first we will mark for identification a copy of the opinion and it will be marked for identification as Defendants Exhibit 34.

Mr. Boydstun, can you throw any light on the further proceedings, if any?

Mr. Boydstun: Yes, the Federal Power Commission held they had no jurisdiction and that case was not on the merits of the thing but on the question of whether the Federal Power Commission had jurisdiction and they held they did not. And we took an appeal from the order of the [fol. 46] Federal Power Commission to the Circuit Court of Appeals and they affirmed the order of the Commission and that judgment, which is reported, is final. We did not make an application for a writ, and the judgment of the Court of Appeals is a final judgment.

The Commissioner: Thank you. We will take that as a stipulation I assume.

Mr. Pittle: Yes, I will be glad to accept that as a stipulation.

The Commissioner: All right, the stipulation will be accepted.

Mr. Pittle, can you tell us whether Mr. Boydstun has been provided frequently with copies of all of these exhibits.

Mr. Pittle: I regret very much to say that all of my exhibits from, I believe, 16 on, I do not have copies of even for my own use, but he was provided with copies of I think 1 through 15.

The Commissioner: Well, we will have to afford Mr. Boydstun an opportunity to study the exhibits which he hasn't previously had—copies of, and of course I will have to study all of them since I haven't previously had an opportunity to see any of the defendant's exhibits so we will postpone Mr. Boydstun's comments with respect to all of the exhibits offered by the defendant and now marked for identification and of course I will postpone my ruling

[fol. 47] until we reach a stage of the trial when the defendant is going forward with his case in chief.

In the meantime, Mr. Boydstun, I will let you have the first opportunity to examine these exhibits that you haven't previously seen, and then when you have completed your examination I would like to get them and read them myself.

Mr. Boydstun: I think we might shorten the matter. Of course we do want to examine each one of them. I am generally familiar with all of the exhibits that have been offered from 16 on down, but at this time I think we could state for the plaintiff that we would not object to the authenticity of any of those exhibits. However we would object to them as to the admissibility, and reserve of course the right to rebut or offer some exhibits in answer to those from 16 on down.

The Commissioner: Yes. Well now when we reach the defendant's case in chief, I will give you an opportunity to state your objections to these exhibits either individually or in a group, and by that time I will have an opportunity perhaps to look over them myself and we will be in a position to rule on them. So for the moment we will let the defendant's offer of these exhibits stand in abeyance, until a later stage of the trial.

Mr. Pittle: The Court may not wish to reconsider its ruling, or its statement, but I was going to suggest that you consider whether it might not be advisable to take the [fol. 48] time now to rule on our exhibits, for this reason: That it will be our contention throughout the proceeding that any testimony contrary to or repetitious of matters contained in the exhibits would not be the best evidence of the facts asserted, for various reasons, and for that reason I would be objecting to any oral testimony along those lines, and it just occurred to me that perhaps we ought to get out of the way the question of whether the documents are admissible and constitute evidence so that you may then rule on objections that might arise. And, similarly, Mr. Boydstun might wish to make——

The Commissioner: Well, that is certainly agreeable with me and in the light of your explanation perhaps the most expeditious way of disposing of these matters which you say will arise from time to time during the plaintiff's testimony is to take such a period of recess at the present

time as may be necessary for me to look over the defendant's exhibits—that is, have we reached the stage now where the plaintiff is ready to go forward with its oral testimony; is that where we stand now?

Mr. Boydstun: I believe that is where we are placed.

The Commissioner: All right, off the record.

(Thereupon discussion was had off the record and thereafter the following proceedings were had on the record:)

The Commissioner: In order to permit all the persons present to have lunch and in order to afford Mr. Boydstun [fol. 49] and myself an opportunity to examine the defendant's exhibits, we will now recess until 2:30 o'clock.

(The recess was taken and thereafter the following proceedings were had to-wit:)

The Commissioner: The Court will come to order.

Mr. Pittle: May it please the Court.

The Commissioner: Yes, sir.

Mr. Pittle: Since our lunch and recess I have obtained copies of four more documents which I would like to offer as Defendant's Exhibits.

The Commissioner: All right, we will mark them for identification.

Mr. Pittle: Beginning with defendant's exhibit——

The Commissioner: The next number is 35.

Mr. Pittle: No. 35, a copy of a letter dated August 19, 1954, from general counsel of Grand River Dam Authority to the District Engineer.

The Commissioner: This document will be marked for identification as Defendant's Exhibit No. 35.

Mr. Pittle: The next is a copy of a letter dated September 8, 1954, from the District Engineer to the general counsel, GRDA.

The Commissioner: That document will be marked for identification as Defendant's Exhibit No. 36.

Mr. Pittle: And the next is a copy of a letter dated [fol. 50] February 9, 1956, from the General Manager of GRDA to the District Engineer.

The Commissioner: It will be marked for identification as Defendant's Exhibit No. 37.

Mr. Pittle: And the next is a copy of a letter dated February 14, 1956, from the acting District Engineer to the Grand River Dam Authority, attention General Manager, together with an attachment, being a form of contract No. DA-34-066-CIVENG-56-479.

The Commissioner: Now these documents will be marked for identification together as Defendant's Exhibit No. 38.

There is a matter related to the numbering of exhibits that I should like to clarify at this time.

During the morning session it is my recollection that counsel for the defendant offered, and we marked for identification, a letter dated March 11, 1946, from the Chief of Engineers of the War Department to Mr. France Paris, the General Manager of the Grand River Dam Authority. That letter, or a copy of that letter was marked for identification as Defendant's Exhibit No. 9. During my examination of the exhibits while we were in recess I noted that there were clipped to the letter, which I have just mentioned, a copy of a communication dated February 14, 1946, from the Grand River Dam Authority, by France Paris, General Manager to the Chief of Engineers, and also [fol. 51] a copy of a second endorsement from the Division Engineer, Southwestern Division, to the Chief of Engineers. That endorsement being dated 22 March 1946.

Now I gather from the exchange of correspondence between the parties during our pretrial proceeding that the defendant probably wishes to offer also the two communications that are clipped to, or stapled to the letter of March 11, 1946.

Mr. Pittle: Yes, we do, Your Honor.

The Commissioner: I think then we will do some renumbering here with respect to that particular group of papers and we will mark for identification as Defendant's Exhibit 9-A the letter dated February 14, 1946; we will mark for identification as Defendant's Exhibit 9-B the letter dated March 11, 1946; and we will mark as Defendant's Exhibit 9-C for identification the endorsement dated 22 March 1946.

Now, Mr. Boydstun, I believe that during the noon recess you had an opportunity to examine these various exhibits with the exception of the four just offered by Mr. Pittle, those four being 35, 36, 37 and 38. Now if there are any

in this previous list that you find unobjectionable, suppose we get them in evidence without further to-do, and then we will take up one by one the exhibits that you do find objectionable.

[fol. 52] DOCUMENTARY EVIDENCE FOR PLAINTIFF

Mr. Boydstun: If the Court please, while we are correcting what we did this morning, I find that I, in my Exhibit 12, which was this photostat, I believe I stated into the record it was pages 1260 and 1261. I should have said 1215, 1216, 1217, and 1260 and 1261. I offered them all together but I didn't—in making my offer I didn't include all the pages.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: Yes.

The Commissioner: To amend the offer?

Mr. Pittle: Certainly; and I might point out that the document itself will show the pages that Mr. Boydstun is now referring to.

The Commissioner: All right, we will then staple those pages together, and collectively they will constitute Plaintiff's Exhibit 12, which is admitted in evidence.

[fol. 53] DOCUMENTARY EVIDENCE FOR DEFENDANT

Mr. Boydstun: If the Court please, as to exhibits up to and including, I guess, 16, that is what was submitted to us in the pretrial conference, by the defendant, and if it is good enough for the record we would like to make the same admissions, and the same objections as were set out in our letter to you dated—set out in a letter to the Hon. Perry W. Morton, Assistant Attorney General, in reply to his letter of April 4, 1957, that was under your directions.

The Commissioner: Yes. Now I have in my own file a copy of that letter but my copy is not an official court document and consequently I think it would be better probably for you to read into the record at this point your objections. You can read them from your previous——

Mr. Boydstun: Okay.

The Commissioner: —letter, or, interpolate any additional comment that you wish to make.

Mr. Boydstun: I think, if the Court please, in the way Mr. Pittle offered these exhibits this morning, they did not appear in the same order in which they did in his letter of April 4.

The Commissioner: Well, I will tell you our present number because I have the documents right before me. Our Defendant's Exhibit 1 for identification is a transcript of a public hearing that was held at Vinita, Okla-
[fol. 54] homa, on June 7, 1937.

Mr. Boydstun: We admit the authenticity of that document, but object to same for the reason it is immaterial and incompetent, and doesn't tend to prove or disprove any issues in the lawsuit.

The Commissioner: Well, suppose we have Mr. Pittle now explain his theory with respect to the admissibility of this document and then I will rule on it.

Mr. Pittle: If the Court please, I am very sorry but our documents were not in chronological order or some other order, so that I could take them as a group. That transcript, or the copy of the transcript is offered by the defendant as part of its defense of estoppel, which it sets forth in its answer. It is part of our affirmative defense, and that will be one of the matters which tend to support, factual background for thaf legal defense.

The Commissioner: Do you wish to say anything further, Mr. Boydstun?

Mr. Boydstun: No, other than I might make this comment if the Court please: As I take it there are two things in that transcript which they rely on, and the first is the statement made by the former Chairman of the Board of Directors, and the other is the statement made by the then Director of the Oklahoma Planning and Resources Board. And of course under our theory of the lawsuit
[fol. 55] the Oklahoma Planning and Resources Board had no authority or jurisdiction—it is a legal question of course—over Grand River, and that George Shaefer had no authority, to bind the Committee, or authority under the sta ements that he made as contained in that record. I take it that is all of the material items, that are in that record that have anything to do with this lawsuit.

The Commissioner: Well, I will overrule the objection and admit this exhibit in evidence for the purpose of

showing that representatives of the State of Oklahoma, and of State agencies were present at that hearing and for the purposes of showing what statements they made at the hearing. Now the parties can argue in their briefs and undoubtedly will do so in considerable degree, with respect to the legal consequences, if any, flowing from the participation by these representatives of the State and of State agencies at the hearing and the various positions which they took at that time.

All right now let's take up Defendant's Exhibit No. 2 for identification, that, in our present system of numbering, appears to be a statement relating to Pensacola Reservoir, project information, prepared by the Tulsa District of the Corps of Engineers; at least that appears from the face of the document to be its nature.

Mr. Boydstun: We admit the authenticity of that document but object to its admission on the ground that it is [fol. 56] immaterial and incompetent.

The Commissioner: Well now, do you admit the truth of the various statements made in the document?

Mr. Boydstun: As I recall, that is a description of the project, how many kilowatts and so on and so forth, and the capacity.

The Commissioner: Something about the historical information—the physical description.

Mr. Boydstun: I think that is correct generally.

The Commissioner: Financial arrangements and so forth.

Well, that particular objection will be overruled, and this document is admitted in evidence as Defendant's Exhibit No. 2.

Now, No. 3 for identification, is a copy of a memorandum dated 14 April 1954, purportedly prepared by Albert E. Coldwell, on the subject of data concerning Pensacola Reservoir, and its effects on Fort Gibson Reservoir.

Mr. Boydstun: We—what was the date of that, Judge?

The Commissioner: 14 April 1954.

Mr. Boydstun: Well, we admit the authenticity of that instrument or exhibit, but object to its admission for the reason it is incompetent, irrelevant and immaterial.

The Commissioner: Do you admit the truthfulness of the statements of fact contained in that?

[fol. 57] Mr. Boydstun: Mr. Holway just calls my attention that there is some disagreement on it—but—on some of the facts, if we are thinking about the same instrument there.

The Commissioner: Well, in the absence of a concession by the plaintiff with respect to the truthfulness of the statements of fact contained in this document, we will pass over it for the time being, and it is not admitted in evidence at the present time and will not be unless there is a subsequent proper predicate laid by the defendant for its admission.

Number 4 for identification, is a two-page statement headed, "Pertinent Data, Pensacola Dam and Reservoir, Grand (Neosho) River," dated September 1955.

Mr. Boydstun: Well, we admit the authenticity of that exhibit and we have no way of knowing whether all the statements are true or not, but therefore we have to deny——

The Commissioner: All right.

Mr. Boydstun: It is immaterial, incompetent and irrelevant.

The Commissioner: —for the time being the objection to Defendant's Exhibit 4 for identification is sustained. However that does not prevent the defendant from subsequently re-offering it on the basis of a proper predicate having been laid.

Defendant's Exhibit No. 5 for identification is a copy [fol. 58] of an order entered by the Federal Power Commission on April 27, 1953, presumably—at least it purportedly was issued on April 27, 1953, although adopted on April 27th—I'm sorry.

Mr. Pittle: The other way around.

The Commissioner: I will correct my statement: An order purportedly was issued on April 27, 1953, although adopted on April 23, 1953. It is an order on project No. 1494, in the matter of the Grand River Dam Authority.

Mr. Boydstun: Is that relative to the costs, Mr. Pittle?

Mr. Pittle: No, sir, if you are asking the purpose I am offering it, it is this: It is to show, in support of our assertion, in our defense—in our answer that this project was licensed by the Federal Power Commission, to show all the terms and conditions of the license, and so that I can

ask the Court to take judicial notice of the law relative to Federal Power Commission, and the conditions under which licenses are issued.

The Commissioner: In answer to your question, Mr. Boydstun, it does appear to be an order determining actual legitimate original cost of an initial project, net changes therein, and prescribing accounting therefor.

Mr. Boydstun: We admit the authenticity of the exhibit. However as to the figures in there and the amount there is some dispute as between the Authority and the Power [fol. 59] Commission. However that order became final, as I recall—however, we think it is immaterial, irrelevant and incompetent.

The Commissioner: I will overrule the objections to this document and admit it for the purpose of showing what the Commission found and what the Commission ordered at the time in question.

Mr. Pittle: Do I understand if the Court please, that that ruling permits the parties to argue the finality of this in the event my pleading is amended, and these figures should come into question?

The Commissioner: Well, for the moment I am admitting it to show that the Federal Power Commission made certain findings; what those findings are; and what the Federal Power Commission ordered upon the basis of those findings.

Mr. Boydstun: As by way of comment, in connection with that, if the Court please, I think that has been amended since then too, or modified to some extent.

The Commissioner: Well, we might find those modifications later on in the documents.

Defendant's Exhibit 6-A for identification appears to be a copy of an order issued by the Secretary of the Interior on August 31, 1943, and effective on September 1, 1943, creating in the Department of the Interior an agency to be known as the Southwestern Power Administration.

Mr. Boydstun: We admit the authenticity of that ex- [fol. 60] hibit but object to its admission for the reason it is incompetent and immaterial and irrelevant. The Grand River Dam Authority was not a party to that action and had no interest in the transaction. It was between two Federal agencies, changing the Federal Works Adminis-

tration—taking the power from the Federal Works Administration to the Interior and setting up Southwestern Power Administration, an independent Government bureau. The Authority had no relations with——

The Commissioner: Mr. Pittle, will you tell us about the relevancy of this document?

Mr. Pittle: If the Court please, the license which was issued by the Federal Power Commission to Grand River Dam Authority provided, among other things, that the project was licensed for a term of fifty years, subject to being acquired at any time by the United States under certain conditions. Certain conditions came about under which the United States acquired the project for a temporary period and turned it over for administration to the Southwestern Power Administration. This is to show that line of legislative and executive directives which brought that about.

The Commissioner: All right, we will admit this document in evidence. The plaintiff's objection being overruled for the purpose of showing an action taken by the Secretary of the Interior, in the historical chain of events [fol. 61] having bearing on this controversy.

Next we come to defendant's exhibit 6-B for identification which purports to be a copy of executive order 9366; that is an order——

Mr. Boydstun: Well, that is the same situation as the other; that is another executive order involved in the transfer of the power from one Government agency to the other, as I recall. And we object to it for the same reason that we did to the other exhibit.

The Commissioner: I assume, Mr. Pittle, the purpose of this particular document is similar to the one you stated a moment ago.

Mr. Pittle: That's correct.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit 6-B for the purpose of showing an action taken by the president.

Then we come to Defendant's Exhibit 6-C for identification, which is a copy of another executive order, this one being number 9373.

Mr. Boydstun: Well, that is the same situation, if the Court please, as the other two.

The Commissioner: All right, I will overrule the objection to this document and admit it in evidence as Defendant's Exhibit 6-C, again for the purpose of showing an official action taken by the president that seems to have some rele-
[fol. 62] vant relationship to the controversy now before the Court. We next come to Defendant's Exhibit No. 7, for identification, which is a copy of a transcript of a public hearing that was held in Muskogee, Oklahoma, on January 27, 1942, relative to the Fort Gibson Reservoir, on the Grand (Neosho) River, Oklahoma.

Mr. Boydstun: We admit the authenticity of this exhibit but object to its introduction for the reason that it is incompetent, irrelevant and immaterial.

The Commissioner: Mr. Pittle, I ~~have~~ glanced over this during the noon recess and I had a little difficulty in locating anybody here who might appear to be authorized to speak for the Grand River Dam Authority. Will you elucidate on that?

Mr. Pittle: This exhibit shows a statement by the Chief Engineer of the Grand River Dam Authority and we will try to pick out the page on which that appears, for convenience; and it is offered in connection—in support of our defense of estoppel; I believe on page 34 at the bottom of the page, a paragraph beginning "W. C. Burnham, Chief Engineer, Grand River Dam Authority, Vinita, Oklahoma: I would register as representing a public works agency. Mr. Wright, Director of the Grand River Dam Authority, Pensacola Reservoir, was unable to be here, as he was called to Washington." And then, so on.

Mr. Boydstun: Those people did not represent either [fol. 63] the State of Oklahoma or the Grand River Dam Authority. Burnham was merely an engineer for the Authority, but at that time he was with the Southwestern Power Administration, or Federal Works—they were representing the Federal agency.

Mr. Pittle: Then I believe this transcript also contains on page 22 statements by the Director of the Oklahoma Planning and Resources Board, which we have asserted in our answer as constituting the basis for authority, if any were needed.

Mr. Boydstun: Under our theory the Oklahoma Planning and Resources Board, on the date of that report, had no jurisdiction over the Grand River Dam; neither did they represent the Grand River Dam Authority.

The Commissioner: On what page does that statement appear?

Mr. Pittle: I believe it is 22, Your Honor, at the bottom of the page, "Don McBride, Director, Oklahoma Planning and Resources Board, Oklahoma City, Oklahoma," and then he proceeded to make a speech.

The Commissioner: Well, I will overrule the objection and admit this document in evidence for the purpose of showing that the Director of the Oklahoma Planning and Resources Board appeared at the hearing, participated in the hearing, and made a statement for the record, and for the purpose of also showing what his statement was. Now in that connection I am wondering whether we ought not [fol. 64] to correct the Commissioner's Exhibit that we passed on earlier this morning, because as I recall it there is a paragraph in there with respect to the Chief Engineer of the Southwestern Power Administration, appearing at this same hearing and I assumed at the time, and nothing to the contrary was said, that the man who appeared actually was the Chief Engineer of the Southwestern—of the Grand River Dam Authority during the period of operation of the facility by the Authority itself and not by the United States.

Mr. Boydstun: I didn't observe that.

The Commissioner: May I see that Commissioner's Exhibit, please?

The particular reference is the last sentence of paragraph 10 of Commissioner's Exhibit No. 1 and I assume now that the statement in that sentence refers to the same meeting that is involved in Defendant's Exhibit No. 7—is that right?

Mr. Pittle: I believe that is correct. And the fact is——

Mr. Boydstun: Exhibit No. 1 was your—was a transcript of a hearing had on June 7, 1937, wasn't it, in Vinita, Oklahoma?

Mr. Pittle: That is Defendant's Exhibit 1, yes, sir.

Mr. Boydstun: Of course this thing we are talking about now was down at Muskogee, wasn't it?

The Commissioner: Well, the hearing that we are talk-
[fol. 65] ing about now was at Muskogee on January 27, 1942.

Mr. Boydstun: They are two separate things—Defendant's Exhibit 1 is that meeting in June 1937.

The Commissioner: Yes. Well now I am trying to find out whether the hearing that is referred to in Commissioner's Exhibit 1, paragraph 10, is the same hearing that is involved in Defendant's Exhibit No. 7, for identification.

Mr. Pittle: That is correct.

The Commissioner: That's right. I am also trying to find out if we are all agreed that the United States was actually operating the facility at that time.

Mr. Pittle: That is my understanding, yes, sir. But Mr. Burnham, as described, was the Chief Engineer of Grand River Dam Authority although at the same time representing—occupying the same position in the Southwestern Development——

Mr. Boydstun: Mr. Burnham was never Chief Engineer for the Authority; in that part of it you are in error.

The Commissioner: Well, since there seems to be some question about his authority to speak for the plaintiff at that time, I am going to correct the Commissioner's Exhibit 1 at this time by striking out the last sentence of paragraph 10.

Now, to get back to Defendant's Exhibit No. 7, that exhibit is admitted in evidence merely for the purpose of showing the participation in the hearing by the Director of the Oklahoma Planning and Resources Board. De-
[fol. 66] fendant's Exhibit No. 8 for identification is a copy of a letter dated 6 January 1944, from the Chief of Engineers to the general counsel of the Grand River Dam Authority.

Mr. Boydstun: We admit the authenticity of that exhibit, and object to it as being incompetent, irrelevant and immaterial.

The Commissioner: I will overrule the objection and admit this document as Defendant's Exhibit No. 8, for the purpose of showing the position taken by the Chief of Engineers, leaving to the attorneys in the case the question of arguing, in extenso, the question of whether the position was correct or incorrect.

Next we have the group of documents that we re-numbered at the beginning of the afternoon session as 9-A, 9-B and 9-C, defendant's exhibits, the series beginning with a letter dated February 14, 1946, from the Grand River Dam Authority by France Paris, General Manager to the Chief of Engineers; and then in 9-B, we have what purports to be a reply by the Chief of Engineers to that letter; and in 9-C we have a second endorsement dated March 22, 1946, from the Division Engineer of the Southwestern Division to the Chief of Engineers.

Mr. Boydstun: We have no objection, if the Court please. I think that the first exhibit—the first part of that exhibit is our exhibit 8, the same thing as our exhibit 8.

The Commissioner: All right. Without objection then [fol. 67] these three documents are admitted in evidence as Defendant's Exhibits 9-A, 9-B, and 9-C, respectively.

Defendant's Exhibit No. 10 for identification appears to be a project report relating to the Fort Gibson Dam and Reservoir project. It is dated June 1946, revised August 1946, and apparently was prepared by the Corps of Engineers Office in Tulsa, Oklahoma.

Mr. Boydstun: We admit the authenticity of the exhibit but we are uninformed and do not know whether the contents thereof is correct; therefore we object to its introduction for the reason that it is incompetent, immaterial and irrelevant.

The Commissioner: Do you want to say something, Mr. Pittle?

Mr. Pittle: If the Court please, this is offered mostly for two purposes, to show some of the history leading to the Fort Gibson Dam and Reservoir project construction, the historical statements in it, and secondly, to show the physical description of the project. We of course have available engineers who can testify from first-hand personal knowledge as to the correctness of the data in the project report if necessary.

The Commissioner: For the time being I will sustain the objection to that document.

Defendant's Exhibit No. 11 is the statement which is [fol. 68] headed, Pertinent Data, Fort Gibson Dam and Reservoir, Grand (Neosho) River, Oklahoma, and is dated September 1955.

Haven't we had a similar document earlier in this series?

Mr. Pittle: We had one relating to Pensacola, didn't we?

The Commissioner: Perhaps so—yes, I have found it now; the other one related to the Pensacola project.

Mr. Boydstun, what do you say?

Mr. Boydstun: That is September '55?

The Commissioner: Yes, sir.

Mr. Boydstun: Well, the same—we admit the authenticity of the exhibit but we are uninformed as to the correctness of the report; we therefore object to it for that reason and for the further reason that it is incompetent, irrelevant and immaterial.

The Commissioner: Well, for the time being I will sustain the objection to this document.

Next, we come to Defendant's Exhibit No. 12 for identification which appears to be a copy of the contract for flowage easements and conveyance of rights-of-way between the Grand River Authority and United States represented by the Chief of Engineers.

Mr. Boydstun: May I inquire—I want to be sure that I am thinking about the right thing—is that the—Mr. Pittle, [fol. 69] is that the contract for the relocation of the line?

Mr. Pittle: Yes, along with flowage easements and—conveyance of flowage easements and relocation——

Mr. Boydstun: It is on the same contract?

Mr. Pittle: Yes, sir.

Mr. Boydstun: We admit the authenticity of the exhibit, and admit—agree to its admission for the purpose of showing that none of the rights claimed in this lawsuit were covered in that transaction.

The Commissioner: Well, I will admit the document in evidence and then you can argue the effect of it. It is admitted as Defendant's Exhibit 12.

Defendant's Exhibit No. 13 appears to be a copy of a petition by the Grand River Dam Authority filed with the Federal Power Commission and seeking an order determining and fixing the charges to be paid to the petitioner for the benefit of the storage and the head water improvement at the Pensacola Power project.

Mr. Boydstun: We admit the authenticity of the exhibit and the correctness of the contents thereof but object to its admission for the reason it is incompetent, irrelevant, and immaterial.

The Commissioner: Mr. Pittle——

Mr. Pittle: If the Court please, we offer this document in evidence as an admission against interest on the part [fol. 70] of Grand River Dam Authority, for whatever purposes the Court may find the facts or allegations will support.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit 13.

Defendant's Exhibit No. 14 for identification appears to be a communication or a copy of a communication dated 17 March 1953, prepared on behalf of Major-General Sturgis and addressed to the Division Engineer, Southwestern Division, at Dallas, Texas, together with a large number of endorsements.

Mr. Boydstun: If the Court please, we admit the authenticity of the exhibit but the exhibit consists of communications and inter-communications, between the Department of the United States to which Grand River Dam Authority was not a party and therefore we object to them as being incompetent, irrelevant and immaterial.

The Commissioner: Mr. Pittle.

Mr. Pittle: If the Court please, one of the terms and conditions of the license under which Federal Power Commission permitted the plaintiff to operate Pensacola was that the Secretary of War would direct the operation for flood control and navigation purposes. That provision is incorporated in the law generally. This series of documents shows the course of action taken by the Department of the Army in determining or in starting to determine what would be reasonable requirements for the regulation of Pensacola Dam under the powers conferred upon the [fol. 71] Secretary of War, and subject to the provisions of the license under the Federal Power control—Federal Power Commission Legislation.

Mr. Boydstun: We think it is purely self-serving intercommunication between them, themselves.

The Commissioner: It seems to me that any official action taken by the Secretary of War in pursuance to that authority might very well be pertinent and admissible as part of the background of the case, but I am inclined to agree with Mr. Boydstun that the inter-agency discussions with respect to it are not properly admissible.

Mr. Pittle: Well, we propose of course to ask in our briefs that judicial notice be taken of the regulations which were issued and this is what the Secretary considered before issuing——

The Commissioner: For the time being I will sustain the objection to this particular series of documents.

We now come to Defendant's Exhibit for identification No. 15-A, which is a copy of a communication prepared on behalf of Major-General Sturgis and addressed to the Division Engineer, Southwestern Division, at Dallas, Texas, dated 12 May 1954, and relates to the subject of head water benefits to the Fort Gibson project.

Mr. Boydstun: We admit the authenticity of that exhibit but it is inter-office, or inter-department communication, which is self-serving, incompetent, irrelevant and immate-
[fol. 72] rial so far as the issues here are concerned.

The Commissioner: I think we might discuss along with that particular exhibit the others in this same series, of 15-B, et cetera, down to and including 15-L. The communications from 15-B to 15-F inclusive, apparently being endorsements to the communication we have numbered as 15-A; do you make the same objection?

Mr. Boydstun: Same objection and comments.

Mr. Pittle: If the Court please, now as to these documents, they are largely communications between departments. The record will show that the plaintiff submitted the claim to the Federal Power Commission and requested it to assess head water benefits against the Fort Gibson project. These documents revealed and show the results of the application submitted by the plaintiff leading to the denial by the Federal Power Commission, and which later became the subject of an appeal to the Court of Appeals.

Mr. Boydstun: Well, that was another communication—inter-office communication between the Government agencies and not with the Authority.

The Commissioner: I think here, as in connection with the matter that we were talking of a moment ago, that the official action taken on behalf of the United States with respect to this petition for head water benefits is properly admissible, but the various communications between differ-
[fol. 73] ent parts of the Corps of Engineers, preliminary to formulating a position on the part of the Corps of Engineers, do not seem to me properly admissible. Therefore

I shall again sustain defendant's objection to these documents——

Mr. Boydstun: I might further——

The Commissioner: The plaintiff's objections, excuse me, to these documents.

Mr. Boydstun: I might further make this observation, if the Court please: As stated this morning, that matter has become a final judgment of the Court of Appeals involving all of those matters, which is binding on all of us.

The Commissioner: All right. Thank you.

Mr. Boydstun: It was a jurisdictional question, not on the merits of the head water question.

The Commissioner: All right. Next we have a document that we have marked for identification as Defendant's Exhibit 16-A, being a copy of a motion apparently filed by the Grand River Dam Authority in a proceeding before the District Court of the United States for the Northern District of Oklahoma, No. 2116 Civil.

Mr. Boydstun: We admit the authenticity of that and also the correctness of its contents. But object to its introduction for the reason that it is incompetent, immaterial and irrelevant.

The Commissioner: I will overrule that objection and [fol. 74] admit the document inevidence as Defendant's Exhibit No. 16-A.

The document previously marked for identification as Defendant's Exhibit 16-B is a companion document and is a copy of an application apparently submitted by the Grand River Dam Authority in the same proceeding, an application being for a distribution of compensation.

Mr. Boydstun: Well, the plaintiff has no objection to this exhibit with this comment: That those cases are still pending in the District Court in the Northern District of Oklahoma, and awaiting trial or disposition.

The Commissioner: All right, this document then is admitted in evidence without objection as Defendant's Exhibit 16-B.

Defendant's Exhibit 17 for identification is a copy of an order dated January 27, 1939, issued by the Federal Power Commission on the application of the Grand River Dam Authority in connection with project No. 1494.

Mr. Boydstun: The plaintiff has no objection to that—

the orders of the Federal Power Commission leading up to the issuance of the license on the Pensacola project.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit 17.

Defendant's Exhibit 18 for identification appears to be a copy of a license issued by the Federal Power Commis-
[fol. 75] sion to the Grand River Dam Authority in connection with project 1494.

Mr. Boydstun: No objections to that, if the Court please; that is our Pensacola license.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit No. 18.

Defendant's Exhibit No. 18 for identification is a copy of a communication purportedly sent by the Secretary of the Federal Power Commission to the Chief of Engineers under date of October 5, 1940, together with numerous endorsements and enclosures.

Mr. Boydstun: We admit the authenticity and the correctness of the contents thereof, but object to its admission for the reason that it is incompetent, irrelevant and immaterial.

The Commissioner: That objection is overruled, and the document is admitted in evidence as Defendant's Exhibit No. 19.

Defendant's Exhibit No. 20 for identification—

Mr. Boydstun: The same admission and the same objection, if the Court please, as to 19.

The Commissioner: All right, the objection is overruled and this document is admitted in evidence as Defendant's Exhibit 20.

Defendant's Exhibit 21, for identification, appears to be [fol. 76] a copy of a letter dated July 1, 1941, from the Chief of Engineers to the Chairman of the Federal Power Commission.

Mr. Boydstun: If the Court please, we admit the authenticity of the exhibit but that is self-serving, and a communication between the two governmental agencies concerning the operation of the Pensacola Reservoir for flood control; and we think it is incompetent, irrelevant and immaterial on this matter.

The Commissioner: How would the position taken by the Corps of Engineers really be significant, Mr. Pittle?

The really important thing was the action taken by the Federal Power Commission on the application, wasn't it?

Mr. Pittle: May I see the document a moment?

The Commissioner: Yes.

Mr. Pittle: I don't have copies of these that you are now referring to.

Yes, the significant thing would be the action finally taken, by the Federal Power, but that is offered, as are some others, to show that since the license was issued, subject to the right of the Secretary of War to regulate the flow and storage for the purposes of flood control, and navigation, the views of the Secretary of War were requested before the Federal Power Commission acted as I understand it.

The Commissioner: Well, I don't suppose we have any controversy here or any contention about——

[fol. 77] Mr. Boydstun: No, I think we have a statute, if the Court please, which gives the Corps of Engineers the authority to regulate the flood control features of any dam that the Government has put any money in, generally speaking. And that was what was involved in the writing of these detailed regulations as to the operating of this project, with others. There is no controversy about the correctness of it.

Mr. Pittle: And that is offered, further, to show that the regulation was undertaken by the Government at that early period.

The Commissioner: I do find a statement in here with respect to the issuance of regulations here.

Now tell me again your theory as to how that has a bearing on the litigation?

Mr. Pittle: Well, we have contended among other things that the Grand River Dam Authority does not own the water, and that it doesn't have the exclusive rights in it. The document, such as Defendant's Exhibit 21 for identification, is offered to show that we did exercise control—regulation over these very waters.

Mr. Boydstun: Flood control, but not for electric power and energy.

Mr. Pittle: Well, of course that would be another question; I'm not trying to say that it was for any other purpose.

[fol. 78] The Commissioner: Then the gist of the exhibit from your standpoint is that part beginning near the middle of page 2, stating as follows:

"In pursuance of the authority conferred on him by Articles 13 and 14 of the license, quoted above, the Secretary of War approved the following regulations of June 24, 1941, conferring on the District Engineer, Tulsa, Oklahoma, the necessary power of control over the pool levels:"

And then specifying in detail, what the regulations were.

Mr. Boydstun: The regulation covering the flood control pool, and not the power pool of the Pensacola Reservoir.

The Commissioner: I will overrule the objection and admit this document in evidence as Defendant's Exhibit No. 21, since, as I understand it, there is no question as to the correctness of that statement.

Mr. Boydstun: No, there is none.

The Commissioner: Next, we have Defendant's Exhibit 22 for identification, being a copy of a letter dated May 18, 1942, from the Secretary of the Federal Power Commission to the general counsel of the Grand River Dam Authority.

Mr. Boydstun: Well, we have no objections to that, if the Court please. I believe that really helps us; it shows the Government claims no interest in controlling——

Mr. Pittle: I will be willing to argue with you about [fol. 79] that, at the appropriate time, sir.

Mr. Boydstun: No objection.

The Commissioner: Well, without objection this document is admitted in evidence as Defendant's Exhibit 22.

Defendant's Exhibit 23 for identification appears to be a copy of a communication dated 13 September 1943, from Colonel F. J. Wilson, a District Engineer, somewhere.

Mr. Boydstun: Here in Tulsa.

The Commissioner: At Tulsa, to the Chief of Engineers, on the subject of rules, regulations, and so forth.

Mr. Boydstun: If the Court please, the exhibits 23, 24-A, 24-B, 24-C, 24-D, and 25, are all—the authenticity of those exhibits is admitted, but we think they are incompetent and immaterial in this lawsuit because all of them involve controversies arising between the two Governmental agencies as to the operation of the Pensacola Reservoir for—during the flood of 1943, at which time the project was

being operated by the Southwestern Power Administration. And the correspondence there with the general counsel of the Authority would only affect the Authority. Somebody was trying to blame the Authority for operating it in a poor manner during that flood. I don't believe any of that is material or competent in this lawsuit.

The Commissioner: Mr. Pittle?

Mr. Pittle: Among other things, if the Court please, [fol. 80] we offer these documents to show that the Federal Government exercised its right to regulate the stream during this period and that the regulations were changed when Southwestern Power took over because of the fact that it was a Governmental agency. The regulations previously in force were directed to regulation or operation by GRDA, and it became necessary when Southwestern Power was created and took over the operation to alter those regulations. And they were. That line of documents referred to by Mr. Boydstun I believe relates to those matters and it shows a continued regulation.

The Commissioner: During the period when the Southwestern Power Administration operated the facility?

Mr. Pittle: That's correct, and insofar as some of them are correspondence between GRDA and any of its officers, and the Federal, or executive, or executive parts of the Government, we believe that they may be admissible as statements against interest.

Mr. Boydstun: Well, as I said, to clarify those matters, if the Court please—which I believe has not been brought out here,—the United States took possession of the Grand River Dam properties under an executive order on November 1, 1941, and operated the project until September 1, 1946, and during that period we had the largest flood on record—in history, on the—on the Grand River, in May 143. And at that time the Southwestern Power Adminis- [fol. 81] tration was operating the project under that executive order, and a controversy arose between the Southwestern Power Administration and the Corps of Engineers as to whether or not—as to how the power pool would be maintained. And during the controversy there was a lot of adverse newspaper stories criticizing the Grand River Dam Authority. They had nothing to do with it. And of

the—the general counsel, in these letters that he had here, was just trying to straighten out the unfavorable publicity.

The Commissioner: Well, I see that Defendant's Exhibit No. 23 is a communication from a Colonel in the Corps of Engineers to the Chief of Engineers. And I don't believe that, since—sufficient showing has been made to establish its admissibility; therefore I shall sustain the objection to it.

Similarly, in the case of Defendant's Exhibit for identification No. 24-A, that being a letter from the acting Chief of Engineers to the Hon. Victor Wickersham, a member of Congress at the time.

Now in connection with Defendant's Exhibit 24-B, for identification, I assume Douglas G. Wright, the person involved here, was the Administrator of the Southwestern Power Administration at the time, is that right?

Mr. Pittle: Yes, that's correct.

Mr. Boydstun: Yes.

[fol. 82] The Commissioner: I will sustain the objection to that document also for the time being.

We come then to Defendant's Exhibit No. 24-C for identification, a letter apparently written by the General-Counsel of the Grand River Dam Authority to Mr. Wickersham. Now Mr. Pittle, do you have a copy of that? Will you point out the portion of that that you regard as an admission by the official of the plaintiff?

Mr. Pittle: Well, in the center of the second—the middle paragraph, the assertion that, as a matter of fact, while the Authority was operating this reservoir during 1941, and up until the advent of Federal control on November 21 of that year by directive of the President, and so forth, which recognizes the exercise by the Federal Government of its prerogative to take over the project and operate it. And I did not know when I offered these whether I was going to have a controversy about that point, and I believe that that tends to establish it.

Mr. Boydstun: We admit, just for the information of the Court and all, that the Federal Government operated this project for that period of November 1941 until September 1, 1946, pursuant to the Federal Power Act and pursuant to the license issued to us, which was in the nature of a contract, and that the Government did control

the waters during that period in which they had possession of it.

[fol. 83] The Commissioner: Well, I will admit this in evidence for the purpose of the statement mentioned by Mr. Pittle a moment ago, as an admission properly establishing the fact that the interest of the Authority in connection with this litigation, that is, Defendant's Exhibit No. 24-C, and it is admitted in evidence to the limited purpose that I mention.

Now, Mr. Pittle, here we have another letter from the general counsel of the plaintiff to the then Senator Clark, dated December 18, 1943; we have marked that for identification as Defendant's Exhibit No. 24-D.

Mr. Pittle: That exhibit—well, simply, this one is another letter in the chain, which is all under Defendant's Exhibit No. 24, relating to the same subject matter.

The Commissioner: Well, can you point out any admissions that you think are pertinent here.

Mr. Pittle: Beginning with the second paragraph, the Federal Power license, issued to the Grand River Dam Authority under date of July 26, 1939, and so forth, provides—and then there is a quotation; and it goes on for several sentences, showing the recognition of the provision that I mentioned before—giving the Federal Government the right to operate the project.

The Commissioner: Well, it will be admitted in evidence for that limited purpose, I am referring now to [fol. 84] Defendant's Exhibit 24-D.

As to Defendant's Exhibit No. 25 for identification that appears to be a copy of a letter from the Administrator of the Southwestern Power Administration to the District Engineer at Tulsa, dated March 17, 1944.

I will consider that inadmissible and sustain the objection to it.

Next, we have Defendant's Exhibit No. 26 for identification, which is a copy of an order dated January 18, 1949, of the Federal Power Commission, in connection with project No. 1954, the order being a dismissal of an application for preliminary permit, previously filed by the Grand River Dam Authority.

Mr. Boydstun: We admit the authenticity of this exhibit

but object for the reason it is incompetent, irrelevant and immaterial.

The Commissioner: I will overrule the objection and admit this document in evidence for the purpose of establishing what the Commission found, and what is ordered in that proceeding.

Defendant's Exhibit 7 for identification is a copy of a letter dated August 12, 1954, from the Grand River Dam Authority to the Secretary of the Federal Power Commission.

Mr. Boydstun: No objection.

The Commissioner: No objection; this instrument is [fol. 85] admitted in evidence as Defendant's Exhibit No. 27.

Defendants's Exhibit No. 28 for identification is a copy of an order issued by the Federal Power Commission on June 22nd, 1955, in connection with the project No. 2183.

Mr. Boydstun: If the Court please, on 27, 28, 29, 30, and 31—down to 31—including Exhibit 31, the Authority admits all of those—the authenticity of all of those exhibits and the correctness of them, that being the orders and licenses for the Markham Ferry project, but object to the admission of them because it is irrelevant, incompetent and immaterial for the purposes of this lawsuit.

The Commissioner: That objection is overruled and these documents are admitted in evidence as Defendant's Exhibits No. 28 to 31, respectively.

32 has already been admitted in evidence.

So we come them to Defendant's Exhibit 33 for identification, being a copy of a letter dated September 25, 1945, from the then Governor of Oklahoma, Robert S. Kerr, to the Chief of Engineers.

Mr. Boydstun: We admit the authenticity of this exhibit, but we object to its introduction for the reason that it is incompetent, irrelevant and immaterial, and is indefinite as to the issues in this lawsuit.

The Commissioner: The objection is overruled.

Mr. Pittle: I wanted to hear—I didn't hear the last [fol. 86] part of the objection—pardon me.

The Commissioner: And the document is admitted in evidence as Defendant's Exhibit No. 33.

Defendant's Exhibit No. 34, for identification, appears to be a copy of a decision rendered by the United States Court of Appeals for the Tenth Circuit on July 12, 1957, in a case entitled, Grand River Dam Authority, against Federal Power Commission, No. 5549.

Mr. Boydstun: We have no objection, if the Court please. I might make this observation: That is a final judgment and there has been no appeal, no application for writ of certiorari.

The Commissioner: Without objection this document is admitted in evidence as Defendant's Exhibit 34.

Now that brings us to the four documents that Mr. Pittle presented at the beginning of the afternoon session. I don't have copies of them myself and haven't seen them. Have you had opportunity to——

Mr. Boydstun: Yes, sir; I gave them to Mr. Holway to check.

The Commissioner: All right. We will have a brief recess then while plaintiff examines them. Suppose we have a ten minute recess.

(Thereupon a ten minute recess was taken and thereafter proceedings had as follows:)

[fol. 87] The Commissioner: The Court will come to order.

Mr. Boydstun, we will now hear you with respect to Exhibits 35 to 38, inclusive.

Mr. Boydstun: Plaintiff admits the authenticity of those exhibits and the correctness of the contents, but objects to the introduction because they are immaterial, irrelevant and incompetent.

The Commissioner: That objection is overruled and the four exhibits are admitted in evidence under the numbers previously indicated. I believe that we have now concluded the initial consideration at least of the documentary evidence and we are ready to proceed with the hearing of testimony from the witnesses.

And, thereupon, pursuant to the order of reference by the Honorable, the United States Court of Claims, in the above-entitled cause, testimony on behalf of the plaintiff and defendant was taken as follows:

[fol. 88] TESTIMONY FOR PLAINTIFF

The Commissioner: Will the plaintiff call its first witness.

Mr. Smith: This witness has not been sworn.

W. R. HOLWAY, a witness produced on behalf of the plaintiff, having first been duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

The Commissioner: Will you have a seat, please, and give the reporter your name and address.

A. W. R. Holway, 1850 South Boulder, Tulsa.

Direct examination.

By Mr. Smith:

Q. Mr. Holway, in what profession are you engaged?

A. Engineering.

Q. And how long have you been engaged in that profession?

A. Since 1915.

Q. Are you a graduate of an accredited school of engineering?

A. Yes, sir, Massachusetts Institute of Technology.

Q. And during the past many years have you specialized to a great extent in hydraulic engineering?

A. Almost entirely.

Q. During what period of time?

Mr. Pittle: We will concede his qualifications.

[fol. 89] Mr. Smith: I would like for the record to show them, please.

Mr. Pittle: All right.

Q. (By Mr. Smith) During what period of time?

A. Since 1915 to the present.

Q. Have you been in charge and did you develop the Spavinaw Dams and the Tulsa water supply, through the building of dams and through hydraulic engineering, carrying the water into the City of Tulsa?

A. Yes, sir.

Q. And are you presently engaged by the City of Tulsa as a consulting engineer for the purpose of providing such additional water supplies as may be needed?

Mr. Pittle: I object to the continued leading; I was willing to concede the witness' qualifications, but if he is going to testify, I ask that he do so.

The Commissioner: Well, I think a certain amount of leading may be helpful in expediting the testimony.

Mr. Smith: I think this is preliminary, your Honor.

The Commissioner: Go ahead—do you recall the question?

A. Yes, sir.

Q. (By Mr. Smith) Your answer was, yes, sir?

A. Yes, sir.

Q. Are you now employed in any capacity by the Grand [fol. 90] River Dam Authority?

A. Yes, sir, under contract since 1937.

Q. And it what capacity is that?

A. We have two capacities. We act as consultants on operations of the project, and we have a contract for the construction—engineering and construction of Markham Ferry Dam, and system improvements.

Mr. Smith: At this point, if the Court please, and for the purpose of the record, I should like to ask that you take judicial notice of all the statutes of the State of Oklahoma, which apply to the authorization and management of the Grand River Dam Authority.

The Commissioner: Yes, the Court will take judicial notice of all the pertinent State statutes, but it would be helpful if counsel would furnish an up-to-date compilation of the pertinent statutes.

Mr. Smith: We will be glad to furnish them, Your Honor, to you both.

Mr. Pittle: Thank you.

Mr. Smith: With copies of the pertinent statutes.

The Commissioner: Thank you.

Q. (By Mr. Smith) Mr. Holway, beginning with your employment in '37, and in the light of the remarks I have made to the Court, was that after the original act authorizing and creating the Grand River Dam Authority had been passed?

[fol. 91] A. Two years after, yes, sir.

Q. In other words, it was passed in 1935?

A. Yes, sir.

Q. A short time after your employment as consulting engineer were you or were you not requested to make a study and surveys of the waters of Grand River and its tributaries in view of determining the advisability of hydroelectric projects thereon?

A. Yes, sir, we were; our contract at that time provided for the construction of the Pensacola Dam, planning, design and construction. But six months after this contract was signed we were asked by the management and the Board of Directors to study the possibilities of adding the Markham Ferry and Fort Gibson dams to the Public Works Administration loan-and-grant agreement that covered only Pensacola.

Q. Did you make such a study pursuant to that request?

A. Yes, sir, we made surveys, borings, plans and estimates of costs of both dams.

Q. And were your surveys and findings contained in a map that was then prepared by you and your associates?

A. We prepared a map at that time which showed the location of the three reservoirs and the connecting transmission line.

Q. I hand you a copy of what has already been introduced by the plaintiff in evidence, the same being a map of the three reservoirs, and, if you can arrange yourself where you——

Mr. Boydstun: I believe that is Plaintiff's Exhibit 9.

The Commissioner: The map has previously been [fol. 92] marked for identification as Plaintiff's Exhibit No. 9.

Q. (By Mr. Smith) I notice on here, Mr. Holway, that there appear three different lakes; will you describe them to the Court.

A. The upper one is Pensacola Reservoir.

Q. Designate that, please.

A. Pensacola Dam being here, and Markham Ferry Dam in the middle of the river, the dam being here, the reservoir back to Pensacola, and the Fort Gibson Dam, backing water up to the Markham Ferry——

The Commissioner: You are beginning up-river and going down stream?

A. Yes, sir.

Q. (By Mr. Smith) This map, the portion of which that you have designated and referred to, was made when, please, sir?

A. In 1939.

Q. By your office?

A. Yes, sir.

Q. Will you please advise the Commissioner why you are positive as to the date on which it was made?

A. Well, because the man that made it left my office in January 1940.

Q. Mr. Holway, I note on this map several other markings showing transmission lines and other facilities, and [fol. 93] also showing your engineer stamp, and your number. Was that contained on the original map which was prepared in 1939?

A. The only thing that was on the original map in 1939 was the three reservoirs as described, and the transmission line to be built, one hundred fifteen thousand volt line to be built from Pensacola down to Markham Ferry and down to Fort Gibson, with the Markham Ferry switching station, and the other lines have been added—were added in 1947, when this became an exhibit in Federal Court, I think on condemnation of lands at Markham Ferry, by the Government.

Q. In other words, if I understand it correctly, and I would like for the Commissioner to understand this, this exhibit that was introduced as Exhibit No. 9 by the plaintiff contains data that wasn't on the original map?

A. That's right.

Q. But on the original map prepared by you in 1939—prepared by you and your office, the three lakes and three dams and original transmission line, from Pensacola to

Markham Ferry and to the Fort Gibson site were included in that original plan?

A. Yes, sir.

Q. Was that transmission line from Pensacola to the proposed site of Markham's Ferry, and the proposed site of Fort Gibson, completed and built?

A. Yes, sir, it was completed, not to the Fort Gibson [fol. 94] dam, but to a point right opposite the Fort Gibson dam.

Q. To an available point?

A. Three or four miles west of the dam site.

Q. As an engineer, and in your professional capacity, please tell the Commissioner whether the transmission line would have been so constructed had not the Authority and you as its Chief Engineer had in mind the construction of the Fort Gibson Reservoir?

Mr. Pittle: I object, without a showing first that Fort Gibson and Markham Ferry could have been constructed by Grand River Dam Authority—the hypothetical question I think is objectionable.

Mr. Smith: I believe it is competent, he as an engineer——

The Commissioner: Let's put our ground around the other way, and I will permit you to ask him why he advised the Authority, if he did, to construct the transmission lines down river.

Mr. Smith: Thank you.

Q. (By Mr. Smith) Did you advise the Authority, Mr. Holway, to construct the additional trunk transmission line down the river, having access to the Markham Ferry site and the Fort Gibson site?

A. Yes, sir, positively.

Q. Will you please tell the Commissioner why you [fol. 95] recommended it?

A. It was a major high tension transmission line to serve as a bus, serving those three generating appliances.

Q. By "the three" what are they, in the record?

A. Pensacola, Markham Ferry, and Fort Gibson.

Q. Did you make engineering studies to determine the feasibility of an inter-connected series of dams and hydro-electric projects on Grand River at the time you were requested by the Board?

A. Yes, sir.

Q. What was your determination and finding as a professional engineer and a hydraulic engineer from your investigations and studies?

A. We found that those two dams were going to cost around $5,000,000 apiece, four and a half in one case and five and a half in the other, and advised the Authority to have the Legislature amend the Act so that they could have financing enough to build those two dams, together with the Pensacola project.

Q. And the "two dams" you are referring to are Markham's Ferry and Fort Gibson?

A. Yes, sir.

Q. And you are referring as to the costs at that time?

A. Yes, sir.

Q. Of course the record will be supplemented, but did [fol. 96] the Legislature amend your Act in accordance with your request?

Mr. Pittle: Well, the statutes will show that, if the Court please; this witness' statement is inadmissible.

Mr. Smith: It is already in an exhibit here, if the Court please.

The Commissioner: Well, whatever the facts show with respect to the amendment of the Act——

Mr. Smith: I am just trying to connect it for the benefit of the Court, in hearing the evidence, but it is in the Act, and it is in an exhibit here.

The Commissioner: All right.

Q. (By Mr. Smith) Mr. Holway, is the operation of Pensacola and Markham's Ferry when built, as economically feasible as would have been the operation by the Grand River Dam Authority of Markham's Ferry, Pensacola and Fort Gibson?

Mr. Pittle: I object, if the Court please; there is no showing as yet and I don't believe there can be that Grand River Dam Authority was given an exclusive right to generate power in that area involved. Without a showing as to that as a foundation, this witness' testimony as to the feasibility, or the economic feasibility, is irrelevant.

The Commissioner: I will overule the objection and permit the witness to express his opinion on the matter.

A. No, sir, the operation is not as economical without [fol. 97] all three dams.

Q. (By Mr. Smith) Just take a moment to explain the technical reason for that, Mr. Holway.

A. Well, because the same water that is stored at Pensacola is used over again at Markham Ferry, and over again at Fort Gibson, so there is no storage that has to be provided in the two lower dams. If you will add a percentage—fifty per cent of Pensacola power at Fort Gibson dam, with the same general overhead for your administration, and with your same technical staff, mechanics, and chief mechanics, and chief electricians, you are producing more of the commodity that you are selling with a less investment and less operating costs, if you have all three than if you had just two.

Q. May I, please, ask you whether all three units operating under a single control could maintain a higher power pool level, and achieve the same or a better flood control effect than operating separately and apart, by the Government, part by the Government and part by the Grand River Dam Authority?

Mr. Pittle: I object—that question is entirely too general, doesn't take cognizance of what the flood control requirements or orders might be in such a situation.

The Commissioner: It is also leading.

Mr. Smith: It was leading, Your Honor, but I would like to point out to the Court the purpose of my interrogation [fol. 98] if I may.

The Commissioner: Yes.

Mr. Smith: This Fort Gibson site is practically at the mouth of the Grand River, and Markham's Ferry site is some seventeen or eighteen miles up stream. When Pensacola was first built it took approximately thirty-six hours—I propose to show it by this witness—for flood waters released to go down into the Arkansas, so that a larger flood storage had to be maintained in order to prevent the meeting of flood waters on the Grand and the immersion of flood waters down the Arkansas from the other direction, but the closer the dams get to the Arkansas, less flood storage would be needed, and the more power pool operation could be had for electricity and energy, with the same efficiency in flood control. And I propose to show by this witness

that had the Grand River Dam Authority been permitted to build the three dams and operate the hydroelectric facilities of all three that the Army Engineers would have made less requirement in keeping with good science, for flood control space in each of the reservoirs and that the State could have had more electric energy output from each of the facilities.

The Commissioner: Well, I will let the witness express his opinion on the effect of centralizing control over three dams in relation to power generation, flood control, or any other pertinent operations.

Mr. Smith: Thank you.

[fol. 99] A. There would be no question in my opinion that the operation of all three dams as one unit would be more economical. The question of flood control would depend on what the Corps of Engineers would work out with the Authority; it would have to be worked out with them, and can be, I think, after Markham Ferry is built.

Q. (By Mr. Smith) Well, the specific question I was asking, Mr. Holway, was this: Do you have an opinion as to whether or not the power pool levels could be increased in Markham Ferry and Pensacola and still maintain the same degree of efficiency for flood control purposes if all three of them were operated as a unit, and by the Grand River Dam Authority, with control only for the flood control features by the Army Engineers.

A. It is my judgment—

Mr. Pittle: I want to renew my objection; I submit that the witness has answered the question and stated that it would be subject to the requirements on flood control about which he didn't know and could not know.

The Commissioner: If you want to amplify your answer in any way, you may.

A. It is my opinion that the power pool of Pensacola and Markham Ferry could be maintained at a higher level except in flood months, and could be dumped ahead of time, and I believe they have been talking to the Corps of Engineers about that for the future.

[fol. 100] Q. (By Mr. Smith) But, with separate management and control and ownership of the projects, it is not possible to work that out?

A. I think the flood control angle can be worked out, but not the efficiency of the three units operating as power units.

Q. Mr. Holway, after you were originally requested in 1937 to make a study of this matter, did the Board of Directors of the Grand River Dam Authority thereafter by official action which was shown by the minutes introduced here in an exhibit employ you to make further studies looking to the building of Fort Gibson and Markham Ferry?

Mr. Pittle: I object now, if the Court please; the Board of Directors' minutes will show what Mr. Holway was employed for, and you don't need his testimony as to that fact.

The Commissioner: Well, it would be harmless; I assume it would be duplicating evidence already in the record. Go ahead.

A. They employed us in the summer of 1940 by action of the Board to prepare plans and specifications on the two dams.

Q. And pursuant to that employment did you prepare the plans and specification?

A. We prepared preliminary plans and specifications and submitted them to the Government agencies at the time.

[fol. 101] Q. That included Markham Ferry and Fort Gibson?

A. Yes, sir.

Q. Then as I understand your testimony briefly from the inception it has been a part of the general plan?

Mr. Pittle: I object to a summary by counsel.

The Commissioner: Well, that does seem objectionable.

Mr. Smith: Thank you.

The Commissioner: The record will show the testimony of the witness.

Q. (By Mr. Smith) Have you attended all the Board meetings of the Grand River Dam Authority, Mr. Holway, since its inception?

A. All except on one or two occasions when I was out of the State.

Q. And on those occasions have you received minutes of the meetings?

A. Yes, sir, in every case.

Q. And you have a complete set of minutes of the meetings from the inception, to date?

A. Yes, sir, I have.

Q. Coupled with your personal knowledge, from having attended all meetings save one or two, when you were gone?

A. Yes, sir.

Q. Has the Grand River Dam Authority through its Board of Directors ever abandoned or discarded the idea [fol. 102] of building Markham's Ferry and Fort Gibson, until the Government came in and built the Fort Gibson dam?

A. No, sir.

Q. That was constantly a part of the plan and the program?

A. Yes, sir.

Q. How many municipalities get water out of the Grand Lake, Mr. Holway?

A. Two from the lake itself.

Q. How many from the river below?

A. Two.

Q. Were all of those municipalities obtaining their water supply from the river—from the Grand River before the creation of the Grand River Dam Authority?

A. No, sir, the town of Grove got their supply from another—from springs.

Q. And with the exception of the town of Grove, the other municipalities had obtained their supply from the lake—from the waters of the lake?

A. That's right.

Q. From your having attended all meetings of the Board of Directors of the Grand River Dam Authority save a very few and having become possessed of copies of the minutes of those that you did not attend, will you please tell the Commissioner whether or not the Board of Directors of the [fol. 103] Authority has ever granted the United States any right to use the water of Grand River.

Mr. Pittle: I object now to this—we admit and concede that we have not acquired from Grand River Dam any authority or any right, and this witness' testimony as to that would be immaterial.

The Commissioner: You may answer the question.

A. No, sir, they never have.

Q. (By Mr. Smith) Then, if the Grand River Dam Authority owned it all at one time they still own it?

Mr. Pittle: I object.

The Commissioner: I sustain that objection.

Mr. Boydstun: I would like to ask Mr. Holway one question, if the Court please.

The Commissioner: Is that agreeable, Mr. Pittle?

Mr. Pittle: I have no objection.

The Commissioner: All right.

Q. (By Mr. Boydstun) Mr. Holway, prior to August 18, 1941, had the Authority abandoned any of its comprehensive plans for the construction of the three dams on Grand River?

A. No, sir, they had not.

Q. The comprehensive plan that you testified about that you made in 1938, '39 and '40, was still the plan of the Authority in August 1941?

A. Yes, sir, it was.

[fol. 104] The Commissioner: I assume plaintiff would like to re-offer its Exhibit No. 9 for identification; am I correct about that?

Mr. Boydstun: That was the map?

The Commissioner: Yes:

Mr. Smith: I would re-offer it, Q. B., with the modification made by Mr. Holway in his evidence.

Mr. Boydstun: At this time, if the Court please, we would like to withdraw our Exhibit 9 that was offered this morning and in lieu thereof offer as amended Exhibit 9 the map so marked as Plaintiff's Exhibit amended, Exhibit 9.

Mr. Pittle: May I ask, if you change—does this map which is now Plaintiff's Amended Exhibit 9, differ physically from the map which was Plaintiff's Exhibit 9?

Mr. Boydstun: No, no, it doesn't, Mr. Pittle; as I stated this morning when we were discussing this exhibit, the purpose of offering it was to show the general comprehensive plan for the development of the three reservoirs on Grand River. The amended exhibit 9—

The Commissioner: Well, by amended exhibit 9 you merely mean the explanation offered by the witness with respect to changes made in this document after 1939?

Mr. Smith: Yes.

Mr. Boydstun: Yes.

The Commissioner: Is that right?

[fol. 105] Mr. Boydstun: That is what I am trying to say. We simply re-offer it with the modifications that have been made by the oral testimony of Mr. Holway.

The Commissioner: All right, Mr. Pittle, what is your position now?

Mr. Pittle: Subject to the qualifications of the witness' testimony we have no objection.

The Commissioner: All right then we will admit in evidence at this time the map that was previously marked for identification as Plaintiff's Exhibit 9. Of course the exhibit is admitted as Plaintiff's Exhibit No. 9 and in connection with it the Court will bear in mind the modifying just furnished by the witness in his testimony.

Now, Mr. Pittle, are you ready to cross-examine the witness?

Mr. Pittle: I just have a couple of questions.

Cross-examination.

By Mr. Pittle:

Q. Mr. Holway, you mentioned drawing preliminary plans for Grand River Dam Authority in connection with Markham Ferry and Fort Gibson; when did you submit the preliminary plans to GRDA?

A. In 1940.

Q. You furnished them to the Authority in 1940?

A. Yes, we filed them—the preliminary plans.

[fol. 106] Q. Yes, sir. Now when were you employed or when did you become engaged in drawing up those preliminary plans?

A. In 1938 we started to work on them.

Q. As to Fort Gibson and Markham Ferry?

A. Yes, in 1938.

Q. As distinguished from those in Pensacola?

A. Yes,—yes, indeed; those were contract drawings and these were preliminary plans.

Q. All right, sir. Now I would like if I may to ask a question or two regarding the opinion you expressed as to the operation of the three dams as a unit or by a single unit,

as compared with operation by separate units. Did I understand you correctly to say that if the dam at Pensacola and a dam at Markham Ferry and Fort Gibson were operated by one single agency it would be, I believe you said, physically easier?

A. I said it would be more economical.

Q. More economical, physically more economical. And you did say something about how it would affect the operation of the river for flood control did you not?

A. Well, I said it would depend on the arrangement with the Corps of Engineers has to how the flood control was operated, because they have jurisdiction, and this Authority does not.

Mr. Pittle: I have no further questions.

[fol. 107] The Commissioner: Do you have anything further?

Mr. Boydstun: Nothing further.

The Commissioner: Thank you, Mr. Holway; and you are excused.

Now, I infer from the statement made during the recess that Mr. Holway wishes to be excused permanently, is that correct?

Mr. Boydstun: Mr. Smith.

The Commissioner: Oh, Mr. Smith.

Mr. Smith: I would like leave of the Court to be excused; I have another trial engagement tomorrow.

The Commissioner: Very well.

Does plaintiff have anything further?

Mr. Boydstun: Nothing further at this time, if the Court please; we close as far as this part of it is concerned.

The Commissioner: All right, we will now adjourn until 10 o'clock tomorrow morning at which time we will hear witnesses for the defendant.

(The adjournment was taken; and the hearing resumed at 10 o'clock A.M., January 14, 1958, and the following proceedings were had:)

The Commissioner: The Court will come to order: I believe that the plaintiff closed out its case in chief at the conclusion of our session yesterday. We have now come to the point where we will hear the defendant's witnesses.

[fol. 108] Mr. Pittle: May we go off the record, please.

The Commissioner: Yes.

(Thereupon discussion was had off the record and thereafter the following proceedings were had to-wit:)

Mr. Pittle: If the Court please, the first witness I propose to call is Mr. Myron DeGeer, Assistant Chief of the Engineering Division of the Corps of Engineers of Tulsa District, to qualify two documents, Defendant's Exhibits 10 and 11, for identification. Defendant's Exhibit 10 is the project report on Fort Gibson Dam and Reservoir and Defendant's Exhibit 11 is the statement of pertinent data in connection with the actual construction of the dam. During the conference after Court with Mr. Boydstun I believe the plaintiff has agreed to withdraw its objections to the accuracy or correctness of the project data, and the pertinent data report; is that correct?

Mr. Boydstun: That is correct; we admit the authenticity of both exhibits and have no objections to the introduction of those exhibits in evidence other than we object for the reason that we think they are incompetent, irrelevant and immaterial to the issues of this case.

The Commissioner: You no longer question the accuracy of the statements of fact contained in these documents?

Mr. Boydstun: No, sir,—that is correct.

The Commissioner: I will overrule the objection then [fol. 109] and admit in evidence the documents that were previously marked for identification as Defendant's Exhibits 10 and 11.

Mr. Pittle: I am going to call Mr. Coldwell.

[fol. 110] TESTIMONY FOR DEFENDANT

ALBERT E. COLDWELL, a witness produced on behalf of the defendant, having been first duly sworn by said Commissioner, was examined, and in answer to interrogatories, testified as follows:

The Commissioner: You may give the reporter your name and address, please.

A. Albert E. Coldwell, 1331 South College Avenue, Tulsa, Oklahoma.

The Commissioner: All right, Mr. Pittle, you may examine the witness.

Direct Examination.

By Mr. Pittle:

Q. What is your occupation or profession, Mr. Coldwell?
A. Supervising hydraulic engineer.
Q. How long have you been a hydraulic engineer?
A. Since 1941—September 1941.
Q. Where are you presently employed, sir?
A. Corps of Engineers, Department of the Army.
Q. And how long have you occupied that position or worked for the Corps of Engineers?
A. Well, that—I have dealt exclusively with hydraulics since 1941.
Q. For the Corps?
A. For the Corps of Engineers.
Q. And for whom did you work before 1941?
[fol. 111] A. I worked for the Soil Conservation Service, Department of Agriculture, as an agriculture engineer.
Q. Will you give us a brief statement of your educational background, mentioning your college, and any degrees you might have.
A. I have a Bachelor of Science Degree in electrical engineering from New Mexico State College; and I am an associate member of the American Society of Civil Engineers and a member of the American Geophysical Union.
Q. You mentioned your degree as a Bachelor of Science in Electrical Engineering?
A. Yes, sir.
Q. Will you give us a very brief description of what that subject includes generally?
A. Well, that subject includes all phases of design and construction of electrical engineering works, and it would include mathematics in connection with electrical engineering and also the construction of steam plants and hydroelectric plants.
Q. Does it include the study of dams and reservoirs, hydroelectric dams and reservoirs?
A. One branch of electrical engineering deals with that subject.

Q. And are you versed in that branch, sir?

A. Yes, I am.

[fol. 112] Q. In connection with your duties, your position with the Corps of Engineers, are you familiar and will you give us a very brief statement of what those duties are?

A. My work with the Corps of Engineers now deals mainly with the hydraulic design and investigations of multiple-purpose projects of river basins, and my work deals with the hydroelectric power in water resources, and sedimentation work.

Q. How long have you been engaged in that phase of the work for the Corps of Engineers approximately?

A. This particular phase of it, about six years.

Q. Have you had occasion to become familiar with the Pensacola Dam and Reservoir on the Grand River in Oklahoma?

A. Yes, quite familiar.

Q. In connection with your work, sir?

A. Yes, sir.

Q. Would you explain briefly generally the circumstances under which you became familiar with that project?

A. Well, in connection with routing the stream flows of the Grand River through Fort Gibson Reservoir, it was necessary to have some idea of the amount of water flowing into and out of both Markham Ferry Reservoir and Pensacola Reservoir in order to obtain the regulated inflow into Fort Gibson reservoir.

Q. Fort Gibson being operated by the Corps of Engineers?

A. Yes, sir.

[fol. 113] Q. Did you make these studies to determine these facts?

A. Yes, I did.

Q. All right now, I show you Defendant's Exhibit 14, for identification, Mr. Coldwell, and call your attention to the first document in the group, which is a letter—or a copy of a letter dated March 17, 1953,—I am sorry, it is a copy of a memorandum dated March 17, 1953, to the Division Engineer, from the Assistant Chief of Civil Works for Power, Department of the Army. Have you ever seen the document before?

A. Yes, I have.

Q. Will you tell us in what connection, sir?

A. In connection with instructions from higher authority in order to study the request that was give in this document.

Q. Do I understand "this document" being the memorandum of March 17, 1953, Defendant's Exhibit 14, is the direction to make the study that you spoke of a moment ago?

A. Yes.

Q. Now I will ask you to examine the remaining endorsements and tell us if you can identify these various—the chain of correspondence, and memoranda—take a few moments to make sure that you know you are familiar with them.

A. Yes, I am familiar with the entire chain of correspondence.

Q. Did you participate in drafting any of the documents included in Defendant's Exhibit 14 for identification?

A. Yes, sir, I did.

[fol. 114] Q. Will you tell us briefly in what connection, sir—what did you do?

A. Well, in accordance with instructions in the basic communication, as it came down through channels to my office, I started the study in 1953 and prepared memoranda—prepared or participated in memoranda or endorsements from the Tulsa District to higher authority, and since there are several endorsements in this chain, each time the correspondence reached the Tulsa District I participated in preparation of the reply thereto.

Q. These are the documents invited in Defendant's Exhibit 14 for identification that you are referring to.

A. Yes.

Q. Now I ask you to look at the power operation rule curves and graphs showing pool elevations—or hydrographs, rather, and several power charts or power graphs, and ask if you can identify those?

A. Yes, I can identify them all.

Q. Will you please tell us whether you have seen them before or did you prepare them or what did you do, sir?

A. The actual drafting on these was done by people under my supervision.

Q. The graphs all bear initials of people under your supervision?

A. Yes, they are.

[fol. 115] Q. Where was the basic information obtained which is portrayed on these graphs?

A. It was obtained by routings that were made by these personnel.

Q. Under your supervision also?

A. Yes.

Mr. Pittle: I offer in evidence Defendant's Exhibit 14 for identification.

Mr. Boydstun: If the Court please, may I ask Mr. Coldwell a question or two?

The Commissioner: Certainly.

Mr. Boydstun: Mr. Coldwell, what was the purpose of the study that is reflected in Defendant's Exhibit 14?

A. It was to determine the effect of Pensacola Reservoir on Fort Gibson power project—especially—in order to prepare a rule curve for operation, of Fort Gibson Reseron the Grand River.

Mr. Boydstun: Does that exhibit reflect that one of the purposes for which the study was made was to work out a cooperating agreement with the Grand River Dam Authority?

Mr. Pittle: Now just a moment; I have no objection to that question on cross-examination but I gather counsel is now questioning on voir dire as to the admissibility of these documents, and I think he is entering into a different area of examination.

[fol. 116] The Commissioner: Yes, we are now trying to find out whether this document qualifies for admission.

Mr. Boydstun: Yes, for the purpose of, maybe, an objection if the Court please, and I wouldn't mind stating it. It is my recollection that one of the purposes of this study was to enter into a coordinating agreement with the GRDA, to coordinate Pensacola with the Fort Gibson operation and that the Authority has never been contacted—it is not a party to any of this inter-office arrangement.

Mr. Pittle: May I respond to that, sir?

The Commissioner: Yes.

Mr. Pittle: I believe the correspondence included in De-

fendant's Exhibit 14 will show just exactly what Mr. Boydstun is referring to.

The Commissioner: Uh huh. Well, you may answer the question, but let's not pursue this phase of it too far.

Mr. Boydstun: That's the only question I have is, if that was one of the purposes of exhibit 14.

A. Well, I think the documents are self-evident, that that was one of the purposes.

Mr. Boydstun: If the Court please, we admit the authenticity of Plaintiff's Exhibit 14 and the correctness of the contents thereof but we object to the admission of it for the reason it is incompetent, irrelevant and immaterial and does not tend to prove or disprove any of the issues in this [fol. 117] case; it is more or less self-serving.

The Commissioner: Well, I will overrule that objection and admit in evidence as Defendant's Exhibit 14, the document that we have previously marked for identification under that number.

Q. (By Mr. Pittle) Mr. Coldwell, I now show you Defendant's Exhibits 15-A through 15-F, inclusive, and ask if you will examine these documents and tell the Court whether you can identify any of them—in that connection I call your attention to the name, A. E. Coldwell, typed on Defendant's Exhibit 15-E.

A. I have seen all these communications and helped prepare and participate in the correspondence concerned.

Q. Was this correspondence a result of the studies that you discussed a moment ago?

A. It was very similar to the other studies, as a result of a basic communication originating in the office, Chief of Engineers, giving certain instructions to the field.

Q. And you, being in the field, what was your function in handling or participating in the prepafation of these memoranda?

A. To make the required studies and give answers to higher authority.

Q. Are these the results of your studies and the answers that you prepared or participated in, sir?

[fol. 118] Yes.

Mr. Pittle: I offer in evidence Defendant's Exhibits 15-A through 15-F.

Mr. Boydstun: We admit the authenticity and the correctness of the exhibits but object for the reason they are incompetent, irrelevant and immaterial and self-serving.

The Commissioner: The objection is overruled and these several documents are admitted in evidence as Defendant's Exhibits 15-A through 15-F.

Mr. Pittle: I have no further questions.

The Commissioner: Do you have any further question?

Mr. Boydstun: No further questions.

The Commissioner: You are excused, Mr. Coldwell.

Mr. Coldwell: Thank you.

Mr. Pittle: If the Court please, there were several other documents which the defendant offered in evidence; they are in the record for identification but I will not attempt to qualify them further for admission. And that completes our phase of the case at this time. I would like to request the Court to take judicial notice in addition of the Oklahoma statutes which Mr. Smith—your associate?

Mr. Boydstun: Yes.

Mr. Pittle: Mentioned yesterday, and all of the Federal Legislation relating to flood control, this project in par-
[fol. 119] ticular, and of course a number of Federal and State decisions. The Federal decisions being matters of law I suppose will be the subject of our briefs—for discussion in our briefs.

The Commissioner: Well, of course the Court of Claims will take judicial notice of all pertinent statutory material both State and Federal. As I mentioned yesterday when Mr. Smith raised the point, it would be helpful to the Court for each side to furnish not only accurate references to statutory material but perhaps copies of any portions that you regard as especially significant with reference to this particular litigation.

Mr. Pittle: Making a distinction between judicial notice and judicial knowledge? Yes, we will be glad to do that.

Mr. Boydstun: We concur in Mr. Pittle's suggestion, Your Honor.

The Commissioner: Thank you. Now does the plaintiff have anything to offer in rebuttal?

Mr. Boydstun: I believe that's all if the Court please on this phase of it.

The Commissioner: Apparently then the trial of the case of the Grand River Dam Authority against the United States has been concluded.

Before we adjourn I would like to thank counsel on both [fol. 120] sides for the pleasant, as well as the competent manner in which the case has been presented.

We will now stand adjourned, gentlemen.

[fol. 121] Reporter's Certificate to foregoing transcript omitted in printing.

[fol. 122] IN THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S EX. 1

Case No. 226-56

IN THE DISTRICT COURT OF MAYES COUNTY, OKLAHOMA

No. 5263

CITY OF TULSA, a Municipal Corporation, Plaintiff,

vs.

GRAND-HYDRO, a Corporation, et al., Defendants

DECREE

Now on this 10th day of February, 1938, the above styled cause came on regularly for hearing. The plaintiff appeared by its city attorney H. O. Bland, and by special counsel Harve M. Langley; the defendant Grand-Hydro, a corporation, appeared by its president and attorney of record W. E. Hudson; the City of Muskogee, a municipal corporation, appeared through its attorney William Rampendahl; the City of Wagoner, a municipal corporation, appeared by its attorney W. O. Rittenhouse; the City of Pryor Creek, a municipal corporation, appeared by its attorney Ernest R. Brown; the Town of Fort Gibson, a municipal corporation, appeared by its attorney Q. B. Boydston; the Oklahoma Hydro-Electric Company, a corporation,

appeared by its attorney Wilbur J. Holleman; the defendant T. C. Bowling appeared in person; Cedar Crest Lakes Company, an Oklahoma express trust, appeared by its attorney Maurice F. Ellison; the defendant Grand River Dam Authority appeared by its general counsel R. L. Davidson and its associate counsel Jack L. Rorschach; the State of Oklahoma and the Oklahoma Planning and Resources Board appeared through Randell S. Cobb, Assistant Attorney General of the State of Oklahoma; the City of Vinita, a municipal corporation, appeared by its attorney W. T. Rye; the City of Miami was not represented by attorney, it having filed an answer that it did not now nor has at any time past used any of the waters belonging to the Grand River [fol. 123] or any of its tributaries. All of the parties present announced ready for trial except the defendant Oklahoma Hydro Electric Company, which asked for a postponement of the trial. The request was withdrawn under an agreement made in open court that after the other parties desiring to introduce evidence had closed their testimony, the Oklahoma Hydro Electric Company should have the privilege if it so desired at that time, of delaying the trial two days, for the purpose of amending its answer and introducing its evidence. Thereupon, the city of Tulsa introduced its evidence, after which the defendants the city of Muskogee, the city of Wagoner, the city of Pryor Creek, the town of Fort Gibson, the Grand-Hydro, Cedar Crest Lakes Company and T. C. Bowling and Grand River Dam Authority introduced their evidence. The introduction of evidence by all parties other than the Oklahoma Hydro-Electric Company having been concluded, the Oklahoma Hydro-Electric Company claimed its right under the agreement made in open court, to a delay of the trial for two days, which claim the court indicated would be allowed, but it was agreed in open court that further hearing of the cause would be continued until February 12, 1938, at 9:00 o'clock A.M., at which time the hearing of the cause would be resumed unless the Oklahoma Hydro-Electric Company at that time was not ready to proceed, in which event, the further hearing was to be further continued until February 14, 1938. Prior to convening of the court on February 12, 1938, the Oklahoma Hydro-Electric Company advised the court that it would not be ready to resume the

hearing of the cause on February 12th, but would be ready to resume the same on February 14th. Upon convening of the court on February 12th further hearing of the cause was continued by the court until 5:00 o'clock P.M. February 14, 1938. Further hearing of the cause was resumed at 5:00 o'clock P.M. on February 14, 1938, and the Oklahoma Hydro-Electric Company introduced its evidence and the Grand River Dam Authority and the Grand-Hydro introduced their rebuttal evidence.

Thereupon, the court having heard all the evidence and the argument of counsel, and being fully advised in the premises, finds and adjudges:

[fol. 124] 1. That Spavinaw Creek is a separate and distinct stream system from that of Grand River, although it is a tributary of Grand River; that the average flow of Spavinaw Creek is 450 cubic feet per second; that the City of Tulsa has actually appropriated to a beneficial use for municipal purposes, 45 cubic feet per second of the flow of said creek; that there is now unappropriated in the flow of said creek 405 cubic feet per second; that the City of Tulsa is diverting from the flow of said creek approximately 45 cubic feet per second, and conveying the same through a conduit to the City of Tulsa for municipal purposes; that the point of diversion is at the Town of Spavinaw, where the City of Tulsa constructed a dam impounding approximately 31,000 acre feet of water, and that the diversion of said water actually began in April 1924, which diversion has been continuous ever since; that on May 11, 1922, the City of Tulsa filed its application with the State Engineer of the State of Oklahoma for a permit to appropriate the minimum flow of said creek (45 cubic feet per second) to a beneficial use, to-wit: a municipal water supply, and on the 5th day of August, 1922, the City of Tulsa filed its amended application with the State Engineer of the State of Olakhoma for a permit to appropriate the minimum flow of said creek for the same purpose; that the State Engineer fixed a day certain for the hearing of said application and amended application, and directed notice of said hearing to be given as provided by law; that due notice of said hearing was given, and on the 28th day of November, 1922, the State Engineer issued a permit to the City of Tulsa and approved its applications for the

appropriation of the entire flow of said creek for municipal purposes; that thereafter the City of Tulsa, on March 23, 1932, filed with the Conservation Commission of Oklahoma an amendment to its applications seeking to appropriate the excess flow of Spavinaw Creek over and above the 45 cubic feet per second already applied for, to meet future needs of the City of Tulsa for water works purposes; that no person, firm or corporation other than the City of Tulsa [fol. 125] has ever applied for the right to appropriate the waters of Spavinaw Creek to a beneficial use, or actually applied the waters of said creek to a beneficial use; that the City of Tulsa has been diligent in the construction of its water works system necessary to use the waters of Spavinaw Creek for municipal purposes and has been diligent in the appropriation of said waters for municipal purposes and has been diligent in the prosecution of its application for a prmit to appropriate said waters for said purpose, and is prior in point of time to other persons, firms and corporations in making application to the proper authorities for such permit.

2. That on the 14th day of July, 1931, the defendant Grand-Hydro, a domestic corporation, filed with the Conservation Commission of Oklahoma its application in due form for a permit to appropriate 4,000 cubic feet per second of the flow of Grand River for the purpose of generating electric energy and power; that the Commission fixed a day certain for the hearing of said application and directed that notice of said hearing be given as provided by law; that said notice was duly given, and on the 29th day of August, 1931, the said Commission issued to the Grand-Hydro a permit to appropriate to a beneficial use (the generation of electric energy and power) 4,000 cubic feet per second of the flow of grand River; that under the authority of said approved application, Grand-Hydro proceeded with diligence to acquire one or more dam sites for the purpose of constructing a dam to impound the waters of Grand River for use in the generation of electric power and energy, and in making extensive engineering investigations and surveys, and in the aquisition of lands in the basin area of the reservoir which would be inundated by the impounded waters, but the court finds and adjudges that the Grand-Hydro did not construct any works or fa-

cilities through which to utilize the waters of said river for the purpose of generating electric energy or for any other beneficial use, and did not actually apply and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to apply or appropriate any of the waters of [fol. 126] said river to any beneficial use, but that if Grand-Hydro acquired any rights under its said approved application, it has transferred and conveyed the same to the Grand River Dam Authority by virtue of its assignment of January 10, 1938.

3. The court further finds and adjudges that on the 20th day of February, 1932, the City of Pryor Creek filed its application with the Conservation Commission of Oklahoma for a permit to appropriate .375 cubic feet per second of the flow of Grand River to meet its present need for municipal water works purposes and .75 cubic feet per second of the flow of said river for its future needs; that the Commission fixed a day certain for the hearing of said application, and directed that notice thereof be given as provide by law; that such notice was duly given, an on the 14th day of April, 1932, the said Commission issued to the City of Pryor Creek its permit to appropriate for municipal purposes .375 cubic feet per second of the flow of said river for its present municipal needs and .75 cubic feet per second of the flow of said river for its future municipal needs; that the City of Pryor Creek constructed its water works system and began taking its water supply from Grand River in 1910, and has used the waters of Grand River for that purpose continuously ever since; that the point of diversion is near the northwest corner of Section 12, Township 20 North, Range 19 East, in Mayes County, Oklahoma.

4. The court further finds and adjudges that on the 29th day of February, 1932, the City of Muskogee filed its application with the Conservation Commission for a permit to appropriate 30 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application and directed that notice thereof be given as provided by law; that such notice was duly given, and on the 4th day of April, 1932, the said Commission issued to the City of Muskogee a permit to appropriate 30 cubic feet per

second of the flow of said river for municipal purposes; that the City of Muskogee began using the water of Grand River for municipal purposes prior to statehood and at statehood was using said waters at the rate of 5 cu. ft. per second and has continuously used the same for such purposes ever since and is now using the waters of said river for such purpose to the extent of 25 cubic feet per [fol. 127] second; that the point of diversion by the City of Muskogee is approximately 1300 feet above the confluence of Grand River with the Arkansas River; that the water works system of the City of Muskogee was constructed and operated prior to statehood and has been operated in its present condition since 1913.

5. The court further finds and adjudges that on March 3, 1932 the City of Vinita filed its application with the Conservation Commission for a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the Commission fixed a day certain for the hearing of said application, and directed that notice be given thereof as provided by law; that such notice was duly given and on the 8th day of April, 1932, said Commission issued to the City of Vinita a permit to appropriate 5 cubic feet per second of the flow of Grand River for municipal purposes; that the said city constructed its water works system and began the diversion of 5 cubic feet per second of the flow of said river for municipal purposes in 1922, at a point on said river in Section 2, Township 23 North, Range 21 East, in Mayes County, Oklahoma, and has ever since continously used the waters of said river for municipal purposes to that extent.

6. The court further finds and adjudges that on the 9th day of March, 1932, the City of Wagoner filed its application with the Conservation Commission for a permit to appropriate 4 cubic feet per second of the flow of Grand River for municipal purposes; that the said Commission fixed a day certain for the hearing of said application, and caused notice of said hearing to be given as provided by law, and on the 14th day of April 1932 said Commission issued to the City of Wagoner a permit to appropriate four cubic feet per second of the flow of Grand River for municipal purposes; that the said city began using the waters of said river for municipal purposes prior to statehood, and at the time of

statehood was using said waters at the rate of 2 cubic feet per second, and has since continuously used the waters of said river for such purposes and is now using 2 cubic feet per second for present needs, and has asked in its application for an additional 2 cubic feet per second for its future needs; that the diversion of said waters from said river by the City of Wagoner began in 1903 and has been contin- [fol. 128] uous ever since; that the point of diversion is located 534 feet north and 890 feet east of the southwest corner of the Northwest quarter (NW ¼) of Section 20, Township 18 North, Range 19 East of the Indian Base and Meridian, in Wagoner County, Oklahoma.

7. The court finds and adjudges that on the 24th day of March, 1932, Cedar Crest Lakes Company, an Oklahoma express trust, filed its application with the Conservation Commission for a permit to appropriate 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, for the purpose of recreation and fish culture; that the said commission fixed a day certain for the hearing of said application, and caused notice thereof to be given as provided by law, but that no permit was ever issued to Cedar Crest Lakes Company by the Commission, nor has any further action been taken on said application; that during the year 1932 the Cedar Crest Lakes Company constructed a dam across Spring Creek inundating 110 acres of land located in Section 24, Township 19 North, Range 19 East, and Sections 18 and 19, Township 19 North, Range 20 East, in Mayes County, Oklahoma, and has continuously maintained said dam to this date, and devoted the water thus impounded to recreation and fish culture.

8. The court finds and adjudges that long before statehood the Town of Fort Gibson began using the waters of Grand River for municipal purposes, and on the advent of statehood was using 1.543 cubic feet per second of the flow of said river for such purposes, and is now and has been continuously since statehood, using 1.543 cubic feet per second of the flow of said river for such purposes, but has never filed any application with the State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, for a permit to appropriate any of the waters of said river for municipal or other beneficial use; that

the point of diversion is located in Section 2, Township 15 North, Range 19 East, in Muskogee County, Oklahoma.

9. The court further finds and adjudges that on June 19, 1922, the Grand River Hydro Electric Company, a corporation, filed its application with the State Engineer for a permit to appropriate the entire flow of Grand River at a point [fol. 129] located 1154 feet north and 87 feet west of the southeast corner of Section 15, Township 23 North, Range 21 East, in Mayes County, Oklahoma, Dam No. 1 for the purpose of generating electric energy and power; that the State Engineer fixed a day certain for the hearing of said application, and directed that notice thereof be given as provided by law; that such notice was duly given and on the 23rd day of September, 1922, the State Engineer endorsed on said application his approval thereof; that on June 18, 1923 the Grand River Hydro-Electric Company, a corporation, filed its applications (3) with the State Engineer to appropriate the entire flow of Grand River for the purpose of generating electric energy at three points on the river, (for dam No. 2 at a point located 2640 feet north and 1320 feet west of the southeast corner of Section 4, Township 21 North, Range 20 East, in Mayes County; for dam No. 3 at a point 2640 feet North of the southwest corner of Section 14, Township 19 North, Range 19 East, in Mayes County; and for dam No. 4 at a point located 2640 feet south and 650 feet west of the northeast corner of Section 22, Township 17 North, Range 19 East, in Cherokee and Wagoner Counties); that the State Engineer fixed a day certain for the hearing of said applications, and caused notice thereof to be given as provided by law, and on July 1, 1924, endorsed on said applications his approval therof; that the Oklahoma Hydro-Electric Company has acquired by mesne assignments and transfers, whatever rights the Grand River Hydro Electric Company ever had or possessed by virtue of filing of said applications and the State Engineer's approval thereof, but the court finds and adjudges that neither the Grand River Hydro-Electric Company nor the Oklahoma Hydro-Electric Company, nor other person, firm or corporation claiming rights under the approved applications of Grand River Hydro-Electric Company, ever constructed any works or facilities through which to use any of the waters of said river for the purpose of generating

electric energy or for any other beneficial use, or ever applied or appropriated any of the waters of said river to a beneficial use; that neither the said Grand River Hydro-[fol. 130] Electric Company nor the Oklahoma Hydro-Electric Company, nor any one claiming rights under the approved applications of the Grand River Hydro-Electric Company used due diligence in the prosecution of improvements necessary to utilize the waters of said river for a beneficial purpose, or used due diligence in the appropriation of the waters of said river to a beneficial use, or used due diligence in prosecuting said applications, or any of them, and that the Grand River Hydro-Electric Company and its assignees, including the Oklahoma Hydro-Electric Company, have abandoned the proceedings instituted by the Grand River Hydro-Electric Company to acquire the right to appropriate the waters of said river to a beneficial use; that the Grand River Hydro-Electric Company failed to pay its corporation license taxes, for which reason its charter was forfeited by the State in 1934, and it ceased to be a corporation and does not now and has not since 1934 possessed any corporate powers, but the court finds that before the forfeiture of the charter, the Grand River Hydro-Electric Company assigned and conveyed all of its rights to the persons who later transferred and assigned such rights to the Oklahoma Hydro-Electric Company, and the court finds and adjudges that the Oklahoma Hydro-Electric Company has no right to appropriate any of the waters of the Grand River to any beneficial use, and that no person, firm or corporation has any right to appropriate any of the waters of Grand River to any beneficial use under or by virtue of the approved applications of the Grand River Hydro-Electric Company; that if any rights ever existed under said approved applications, they have been abandoned and forfeited and ceased to exist prior to the enactment of Article 4, Chapter 70, of the 1935 Session Laws of the State of Oklahoma, creating the Grand River Dam Authority and appropriating to it the entire flow of the Grand River and conferring upon it the right to control, store, preserve and use the waters of said river for the beneficial purposes specified in said Act.

10. The court further finds and adjudges that the Oklahoma Hydro-Electric Company has never applied to the

[fol. 131] State Engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority, for any permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of said waters to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

11. The court finds and adjudges that the City of Miami has never applied to the State engineer, the Conservation Commission, or the Oklahoma Planning and Resources Board, or any other state authority for a permit to appropriate any of the waters of Grand River to a beneficial use, and has never actually applied or appropriated any of the waters of said river to a beneficial use, and does not now have any right to appropriate any of the waters of said river to a beneficial use.

12. The court finds and adjudges that on September 25, 1931, the defendant T. C. Bowling filed his application with the Conservation Commission for a permit to appropriate 550 acre feet of the flood flow of Mayes Branch, a tributary of Grand River in Mayes County, Oklahoma, for the purpose of fish culture and irrigation, and on February 20, 1932, the said defendant filed with said Commission an amended application for a permit to appropriate 550 acre feet of the flow of said Mayes Branch for the same purposes; that the said Commission fixed a day certain for the hearing of said application and amended application, and caused due notice thereof to be given as provided by law; that on March 26, 1932, the said Commission issued to said defendant a permit to appropriate the said 550 acre feet of the flow of Mayes Branch for said purposes; that the said defendant on or about the 26th day of March, 1932, constructed a concrete core wall and earthen dam across said Mayes Branch and inundated about 30 acres of land, and has continuously maintained said dam to this date, devoting the waters so impounded to the culture of fish and the irrigation of shrubbery, trees and garden spot on adjacent land.

13. The court further finds and adjudges that all of said permits for the appropriation of the waters of Grand River and Spavinaw Creek were prematurely issued because no [fol. 132] hydrographic survey of the stream system of the grand River or Spavinaw Creek had ever been made

and filed as required by law, and no judicial determination by a court of competent jurisdiction of the appropriated and unappropriated waters of said Grand River or Spavinaw Creek had ever been had; that a hydrographic survey of the stream system of the Grand River was made by the Oklahoma Planning and Resources Board and filed in this cause on February 10, 1938, and that no adjudication by any court of competent jurisdiction of the appropriated and unappropriated waters of the stream system of Grand River has ever been made heretofore; that no vested rights to appropriate any of the waters of Grand River to a beneficial use have accrued to any parties to this cause except the Grand River Dam Authority since statehood; that no person, firm or corporation ever appropriated or applied the waters of Grand River or Spavinaw Creek to a beneficial use prior to statehood, other than the Town of Fort Gibson to the extent of 1.543 cubic feet per second, the City of Wagoner to the extent of 2 cubic feet per second and the City of Muskogee to the extent of 5 cubic feet per second; that said three cities have an equal right to use the waters of Grand River for municipal purposes to the extent herein adjudged, which right is prior and superior to the rights of all other parties to that extent.

14. The court further finds and adjudges that no person, firm or corporation other than the Grand River Dam Authority has acquired since statehood the right to appropriate any of the waters of Grand River to a beneficial use; that Article 4 of Chapter 70 of the 1935 Session Laws of the State of Oklahoma, which became effective on the 29th day of July, 1935, appropriated to and vested in the Grand River Dam Authority the absolute right to control, store and preserve the waters of Grand River for the purposes set forth in said Act, including the generation of electric energy, irrigation, recreation and the prevention of damage to persons and property from the flood waters of said river, and operated as an appropriation of all of the waters of Grand River to the Grand River Dam Authority for the purposes therein specified, subject only to the right of the Town of Fort Gibson to use for municipal purposes 1.543 [fol. 133] cubic feet per second of the flow of said river, the right of the City of Wagoner to use 2 cubic feet per second of the flow of said river for municipal purposes, and the

right of the City of Muskogee to use 5 cubic feet per second of the flow of said river for municipal purposes, at the points of diversion hereinbefore adjudged; that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the City of Vinita, the City of Pryor Creek, the City of Miami, T. C. Bowling, Cedar Crest Lakes Company, the Oklahoma Hydro-Electric Company, the Grand River Hydro-Electric Company, the Oklahoma Planning and Resources Board, and all other persons, firms and corporations save and except the Town of Fort Gibson, the City of Wagoner and the City of Muskogee to the extent hereinbefore adjudged, and that the right of the Grand River Dam Authority to appropriate the waters of Grand River is prior and superior to the rights of the town of Fort Gibson, the City of Wagoner and the City of Muskogee to appropriate the waters of said river in excess of 1,543 cubic feet per second for the Town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and the court further finds and adjudges that the Act creating the Grand River Dam Authority is a legislative appropriation to the Grand River Dam Authority of all the waters of Grand River and its tributaries in Oklahoma, except 1.543 cubic feet per second in favor of the town of Fort Gibson, 2 cubic feet per second for the City of Wagoner and 5 cubic feet per second for the City of Muskogee, and that it is unnecessary for the Grand River Dam Authority to apply to the Oklahoma Planning and Resources Board for a permit to appropriate the waters of Grand River to a beneficial use or secure from the Oklahoma Planning and Resources Board a permit or license to appropriate said waters to a beneficial use, or to construct works or facilities for use in applying said waters to a beneficial use; that no person, firm or corporation other than those hereinbefore mentioned, has ever applied for the right to appropriate or actually appropriated the waters of said river to a beneficial use.

15. The court further finds and adjudges that the Grand River Dam Authority has declared its intention to construct and is now engaged in constructing a dam approx- [fol. 134] imately 147 feet in height, across the Grand River near the Town of Pensacola, in Mayes County, Okla-

homa; that said dam will impound at the power pool level 1,600,000 acre feet of water, and at the flood pool level 2,200,000 acre feet of water; that the Grand River Dam Authority has declared its intention and is proceeding to construct in connection with the said dam, a hydro-electric power plant with an installed capacity of 60,000 K.W., through which will pass during operation of the plant, water varying from 1,000 to 6,000 cubic feet per second, said dam to be equipped with flood gates to control the flood waters of said river and with a sluice gate 10 feet square in the lower part of the dam structure, through which the waters of the river may be discharged at any time.

16. The court further finds and adjudges that at the Pensacola dam site the average flow of the Grand River is 6300 cubic feet per second, and that at the mouth of said river the average flow of the stream is 8400 cubic feet per second; that the run-off of the water shed of the Grand River below the Pensacola dam site is more than sufficient to supply the needs of the City of Pryor Creek, the City of Wagoner, the City of Muskogee and the Town of Fort Gibson, which take their water supply from the Grand River below the Pensacola dam site, and that the construction and operation of the Grand River dam and hydro-electric power plant by the Grand River Dam Authority will maintain in the channel of the Grand River below the Pensacola dam site, a very much larger flow during dry periods than now exists; that the control of the flood waters of Grand River through operation of the flood gates of said dam, will protect the water works facilities of said cities from inundation during flood periods; that the construction and operation of said dam by the Grand River Dam Authority will substantially aid in preventing the waters of the Arkansas River from entering the intake of the Muskogee water works system; that the construction and operation of said dam and hydro-electric power plant will materially benefit the municipalities using the waters of Grand River for municipal purposes, by maintaining in said river a regulated flow of water and providing them a better quality of water for their consumption; that the City of Vinita takes its supply of water for [fol. 135] municipal purposes from the Grand River above the Pensacola dam site.

17. The court further finds and adjudges that neither the Oklahoma Hydro-Electric Company, the Grand-River Hydro-Electric Company, the Grand-Hydro, nor Clontz & Bozarth, have any rights to any of the waters of Grand River or its tributaries, and have never appropriated or applied any of the waters of said stream or its tributaries to a beneficial use.

18. The court further finds and adjudges that subject to the prior right of the Town of Fort Gibson to divert and appropriate for municipal purposes 1.543 cubic feet per second of the flow of Grand River, and of the City of Wagoner to divert and appropriate for municipal purposes 2 cubic feet per second of the flow of Grand River, and of the City of Muskogee to divert and appropriate for municipal purposes 5 cubic feet per second of the flow of Grand River, and the prior right of the Grand River Dam Authority to appropriate all of the remaining flow of the Grand River for the purposes set forth in the Act creating the Grand River Dam Authority, the priorities of the parties hereto in the matter of making application to the proper authorities for a permit to appropriate the waters of Grand River to a beneficial use since statehood, are as follows and for the following purposes and to the following extent:

(1) The City of Pryor Creek to the extent of .375 cubic feet per second for its present municipal needs, and .75 cubic feet per second for its future needs;

(2) The City of Muskogee to the extent of 30 cubic feet per second for municipal purposes;

(3) The City of Vinita to the extent of 5 cubic feet per second for municipal purposes;

(4) The City of Wagoner to the extent of 4 cubic feet per second for municipal purposes;

(5) T. C. Bowling, the waters of Mayes Branch, a tributary of Grand River, to the extent of 550 acre feet for fish culture and irrigation;

(6) Cedar Crest Lakes Company, 500 acre feet of the flow of Spring Creek, a tributary of the Grand River in Mayes County, Oklahoma, for recreation and fish culture.

[fol. 136] 19. It is further ordered and adjudged by the court that the total costs of this action are hereby taxed at $150.00, of which said sum the plaintiff of the City of Tulsa will pay $75.00, and the Grand River Dam Authority $50.00, the City of Muskogee $15.00, and the Town of Fort Gibson and City of Wagoner each $5.00.

20. The defendants Oklahoma Hydro-Electric Company, City of Muskogee, City of Wagoner, City of Pryor Creek, City of Vinita, City of Miami, Town of Fort Gibson, Cedar Crest Lakes Company and T. C. Bowling each excepts to the court's findings and decree, which exceptions are hereby allowed by the court.

Rendered in open court this 14th day of February, 1938.

N. B. Johnson, Judge.

[fol. 137] [Endorsed:] No. 5263. In the District Court of Mayes County, Oklahoma. City of Tulsa, a Municipal Corporation; Plaintiff, vs. Grand-Hydro, a Corporation, et al; Defendants. DECREE Filed in the District Court Mayes County, Oklahoma, February 10, 1938. R. A. Delozier, Court Clerk. Recorded in Civil Journal. No. 16 at Page 482-83-84-85-86-87-88-89.

[fols. 138-138a] IN THE UNITED STATES COURT OF CLAIMS

SUBMISSION OF CASE

On May 4, 1959, the case was submitted on the merits without argument by Mr. Q. B. Boydstun for the plaintiff and by Mr. Herbert Pittle for the defendant.

[fol. 139] IN THE UNITED STATES COURT OF CLAIMS

No. 226-56

GRAND RIVER DAM AUTHORITY

v.

THE UNITED STATES

Mr. Q. B. Boydstun for the plaintiff.

Mr. Herbert Pittle, with whom was Mr. Assistant Attorney General Perry W. Morton, for the defendant.

OPINION—July 15, 1959

MADDEN, *Judge*, delivered the opinion of the court:

The plaintiff, the Grand River Dam Authority, is an agency of the State of Oklahoma, upon which the State of Oklahoma had conferred the right "To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;" and "To develop and generate water power and electric energy within the boundaries of the District."

Pursuant to the power granted to it, the Authority made a survey of the Grand River and adopted a plan which contemplated the erection of a dam at Pensacola, and one at Markham Ferry, and one at Fort Gibson. With funds supplied by the defendant, a grant of $8,500,000 and a loan of $11,500,000, it completed the erection of a dam at Pensacola in 1940. On May 12, 1939, the Legislature of Oklahoma authorized the plaintiff to issue $10,000,000 of bonds for the construction of dams at Markham Ferry and at Fort Gibson, and by 1940 it had acquired lands, easements, and rights-of-way, and had constructed transmission lines, sub-

stations and other facilities for the connection of the [fol. 140] Pensacola project with its contemplated Markham Ferry and Fort Gibson dams.

However, before anything further had been done by the plaintiff, Congress, on August 18, 1941, passed the Flood Control Act (55 Stat. 638, 645), which authorized, among other things, three dam-and-reservoir projects on the Grand River, one at Pensacola, one at Markham Ferry, and another at Fort Gibson, to be constructed by the United States. On May 22, 1946, before any construction had been begun by the plaintiff on a dam at Fort Gibson, the defendant began the construction of a dam at this site and completed it on June 15, 1950.

The Grand River is a non-navigable stream, but it is one of the tributaries of the Arkansas River, a navigable river. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the improvement and regulation of navigation, the control of floods, and the production of hydroelectric power on the Arkansas River and its tributaries.

The plaintiff sues the defendant for the taking of its property as a result of this project. It claims that the defendant must pay compensation for (1) its water power rights at the Fort Gibson unit, (2) its exclusive franchise to develop electric power and energy at the Fort Gibson unit, and (3) certain items of severance damages including storage and headwater benefits accruing to the Pensacola unit from the Fort Gibson unit; the cost and value of surveys, plans and specifications for the Fort Gibson unit; and the loss of the use and value of certain lands and rights-of-way theretofore acquired for the inter-connection of the Fort Gibson unit with the plaintiff's system and for the distribution of electric power and energy from the Fort Gibson unit.

The right of a state to control and utilize the water of a non-navigable stream within its boundaries is subordinate to the right of the United States to control such waters to the fullest extent necessary to improve or regulate navigation on a navigable river to which the non-navigable stream is a tributary. There is no question as to the power of the Federal Government to do what it has done here. *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508. The question be-

[fol. 141] fore this court is whether or not it must pay just compensation for any private property it has taken in carrying out its project.

The Commerce Clause of the Federal Constitution, Article I, Section 8, gives to the United States the power to improve and regulate navigable waters without any liability for damage to private property within the bed of the navigable stream, i.e., the lands below ordinary high-water mark, and water rights in navigable streams below high-water mark are inferior to and subject to this superior navigation easement and may be taken without compensation. *United States* v. *Willow River Power Co.*, 324 U.S. 499; *United States* v. *Chicago, Milwaukee, St. Paul, and Pacific Railroad Co.*, 312 U.S. 592; *United States* v. *Appalachian Electric Power Company*, 311 U.S. 377; *United States* v. *Chandler-Dunbar Water Power Company*, 229 U.S. 53. Where Congress has appropriated the entire flow of a navigable river for a project designed to serve the interests of navigation although other purposes are also served, the owner of fast lands above the high-water mark of the stream has no compensable property rights in the flow of the navigable river. *United States* v. *Twin City Power Company*, 350 U.S. 222.

The United States also has the power to take private property on non-navigable streams which are tributary to navigable streams, and such Government action cannot be enjoined. *Oklahoma* v. *Atkinson Co., supra.* In that case, the State of Oklahoma sought, without success, to enjoin the Federal Government from proceeding with the construction of the Denison Dam.

But if the Governmental action, under its power to regulate and improve navigable streams, results in the taking of private property located on a non-navigable stream which is a tributary of the navigable river, the United States must pay just compensation for the private property so taken. *United States* v. *Kansas City Life Ins. Co.*, 339 U.S. 799; affirming 109 C. Cls. 555; *United States* v. *Cress*, 243 U.S. 316; *Iowa-Wisconsin Bridge Company* v. *United States*, 114 C. Cls. 464, cert. denied, 339 U.S. 982.

The question then becomes whether or not the plaintiff herein had property rights which have been taken by the United States. We are not faced with a situation involving

water rights in the flow of a navigable stream as in *United* [fol. 142] *States* v. *Twin City Power Company*, *supra*. The State of Oklahoma owns the waters of the Grand River, a non-navigable stream, and the State conferred on the plaintiff all the rights which is possessed in the stream. Oklahoma does not follow the common law doctrine of riparian rights but follows instead the doctrine of prior appropriation for beneficial use or the so-called "Arid States Doctrine." Under this doctrine, the water running in a natural stream is the property of the State. Oklahoma Code, Title 60, Section 60 and Title 82, Section 1, O.S. 1951; *Murphy* v. *Kerr*, 296 Fed. 536. The property taken in the *Cress* and *Kansas City Life Ins. Co.* cases, cited above, was the impairment of the value of land in and adjacent to a non-navigable stream. In the *Kelly* case, reported with the *Cress* decision, the property right which was taken and for which compensation had to be paid was the right to the natural flow-off of the water in the non-navigable stream. *Cf. Willow River Power Company*, *supra*, where the Supreme Court said there was not the same right to have the navigable St. Croix flow tail waters away at natural levels that there was in *Kelly* to have the non-navigable stream run off his tail waters at natural levels. Water rights are a property interest which if taken by the United States must be paid for. *International Paper Company* v. *United States*, 282 U.S. 399. We believe the same rule should apply to the instant case, and that the plaintiff's vested water rights on a non-navigable stream were property rights which could not be taken without just compensation.

The other items of property which the plaintiff claims have been taken by the United States include its franchise to develop and generate electric power and energy at the Fort Gibson site, and certain items of severance damage. A license of franchise is a property right for the taking of which compensation must be paid. *International Paper Company* v. *United States*, *supra*; *Frost* v. *Corporation Commission*, 278 U.S. 515; *Jackson* v. *United States*, 122 C. Cls. 197; *United States* v. *Smoot Sand & Gravel Co., Inc.*, 248 F. 2d 822. *Cf. Southern Counties Gas Co.* v. *United States*, No. 483-54, decided January 15, 1958, in which this court found that the actions of the United States

had made the franchise less valuable but did not amount to a taking of the franchise.

[fol. 143] As to the items of severance damages, we believe that these were in the nature of indirect or consequential damages and therefore not compensable. *Mitchell* v. *United States*, 267 U.S. 341; *Omnia Commercial Company* v. *United States*, 261 U.S. 502.

The Government's primary defense to this lawsuit was that the plaintiff did not have any private property rights which could be the subject of a taking by the United States. We have answered that contention above. The Government has raised certain other defenses which we have considered and have rejected. The Government's suggestion of an estoppel from certain meetings, letters, etc., seems to us to have no basis. The Government, of course, had the right to take the plaintiff's property, and the only question before this court is the question of whether it could take it without compensation. The Government also urges that the present claim will be "released" by payment to and acceptance by the plaintiff of $6,500,000 authorized but so far as we know not appropriated by an Act of Congress. There is a question as to whether that authorization applied to this action at all or related solely to the Markham Ferry project. In any event, the appropriation, including the conditions, is, of course, a unilateral action on the part of the United States and cannot bind the plaintiff, unless it gets the money and thereby or otherwise releases its rights.

The plaintiff is entitled to recover just compensation for the taking of its water rights and its franchise. The amount of recovery will be determined in further proceedings pursuant to Rule 38(c).

It is so ordered.

LITTLETON, *Judge* (*Ret.*) and LARAMORE, *Judge*, concur.

WHITAKER, *Judge*, dissenting:

The vice in the opinion of the majority stems from the concept embraced in this sentence from its opinion: "The State of Oklahoma *owns* the waters of the Grand River, a non-navigable stream * * *." The State of Oklahoma did not "own" the waters of the stream; it merely had the right to regulate and control the use of them for the benefit

of its citizens. "Ownership" by the state is a concept repugnant to the American theory of government; it is "con-
[fol. 144] trary to the genius of a free government." Under the American system of government, natural resources belong, not to the state, but to the people. The state is not the overlord, doling out privileges to his underlings; it is the servant of the people, chosen by them to administer their common resources for the benefit of all, according to their respective rights. Its sole right is that of regulation and control.

But this right of one of the states of the Union is subject to the superior right of the United States to regulate and control the waters of the river, in the interest of navigation and purposes related thereto. Because the United States had this superior right, it is not liable for the actions complained of.

That, in the opinion of the Chief Judge and me, is the essence of the case. If we are correct in our premise, there has been no taking of private property for public use for which the Fifth Amendment requires the payment of just compensation. Plaintiff, the state's agent, of course has no greater right than its creator, the State of Oklahoma.

The issue presented is a clash in the exercise of the powers of two sovereignties—on the one hand, the power of the Federal Government, under the Commerce Clause of the Constitution, to use and control the waters of a non-navigable tributary of a navigable stream, in the interest of navigation on the navigable stream; and, on the other hand, the power of a state to use and control those waters for irrigation, the production of power or otherwise, in the interest of its citizens. If the powers of the Federal Government extend to the right of regulation and control of the waters of a non-navigable tributary of a navigable stream to the extent necessary to control and improve navigation on the navigable stream, its power to do so supersedes the power of the state to use and control the waters of this stream.

That the powers of the Federal Government do extend to the control and use of the waters of a non-navigable stream for the improvement of navigation on a navigable stream to which it is tributary is settled by *Oklahoma v. Atkinson Co.*, 313 U.S. 508, 523. Wherever this power comes in con-

flict with state power, the state power must yield. It was so held in *Oklahoma* v. *Atkinson Co., supra.* It had been so held long before in *United States* v. *Rio Grande Irriga-* [fol. 145] *tion Co.*, 174 U.S. 690. In that case the state sought to use the waters of the Rio Grande, far above the point where it was navigable, for irrigation, and had given the respondent the right to do so. The Supreme Court said the United States might enjoin such a use because it would interfere with the navigability of the river down stream. The Court said that the power of New Mexico to use those waters was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." (Page 703.)

In *Florida* v. *Mellon*, 273 U.S. 12, 17, is was said: "Whenever the constitutional powers of the federal government and those of the state come into conflict, the latter must yield," citing a number of cases.

In *Oklahoma* v. *Atkinson Co., supra*, the Federal Government had let a contract to respondent to erect a dam on the Red River some 500 mile above the point where it was navigable. Oklahoma sought to enjoin the erection of the dam, insisting that it was beyond the constitutional power of Congress to build it, and that the building of it would interfere with the state's own program for water development. In answer to the latter contention, the Supreme Court in an unanimous decision said, at pages 534-535:

> And the suggestion that this project interferes with the state's own program for water development and conservation is likewise of no avail. That program must bow before the "superior power" of Congress. *United States* v. *Rio Grande Dam & Irrigation Co., supra*, p. 703; *New Jersey* v. *Sargent*, 269 U.S. 328, 337; *Arizona* v. *California*, 298 U.S. 558, 569; *United States* v. *Appalachian Power Co., supra.*

This is in harmony with the purpose declared by Congress in the Federal Power Act, 49 Stat. 846, to assume priority in the control of such waters. In section 23(b) of this Act, it is prohibited that any dam should be constructed by any "person, association, corporation, state, or municipality" on such a non-navigable stream until it receives a license

from the Federal Power Commission. The validity of this Act, as so construed, was sustained by the Supreme Court in *United States* v. *Appalachian Power Co.*, 311 U.S. 377. [fol. 146] When the Federal Government ousts the state government and takes control over the waters of the river, it has taken no property right of the Grand River Dam Authority, an agency of the State of Oklahoma; it has merely exercised its right to erect a dam at this place, which was superior to the right of the State of Oklahoma to do so, and, hence, superior to the right of its agency to do so. In doing so, it did not take private property for public use which it is required by the Constitution to pay just compensation.

When it decided to erect the dam the Federal Government did take certain lands, rights-of-way, and other easements that had been acquired by the Authority, but these have been paid for. The only thing that has not been paid for is the exclusion of Oklahoma and its agent from control and use of the waters of this river. The Federal Government having a superior right to use and control them, it does not have to pay the holder of a subordinate right for its exercise.

This necessarily follows from the holding in *United States* v. *Rio Grande Irrigation Co., supra.* As stated previously, that company undertook to appropriate all the unappropriated waters of the Rio Grande River in the State of New Mexico, in which state the Rio Grande River was non-navigable, but the Supreme Court held that the United States was entitled to an injunction to prevent this. If the United States may enjoin the appropriation of waters by a corporation authorized by a state to do so, the United States certainly does not have to pay the corporation for the deprivation of that right.

That case, if authority were needed, would seem to dispose of plaintiff's claim for compensation for the taking of its right to erect a dam at this place and, by so doing, to utilize the water power of the river.

The majority comes to a different conclusion because they start with a false premise, that this was a taking of private property for public use.

JONES, *Chief Judge*, joins in the foregoing dissenting opinion.

[fol. 147] FINDINGS OF FACT

The court, having considered the evidence, the report of Trial Commissioner Mastin G. White, and the briefs and argument of counsel, makes findings of fact as follows:

1. The Grand River rises in Morris County, Kansas. It flows in a southeasterly direction to the vicinity of Wyandotte, Oklahoma, and then in a southerly direction until it joins the Arkansas River at a point not far from Muskogee, Oklahoma. The stream is known as the Neosho River in Kansas and as the Grand River in Oklahoma. (The Oklahoma designation will be used in the findings of fact, since this case involves an agency of the State of Oklahoma.) The Grand River is approximately 460 miles long and drains a total area of about 12,660 square miles. The principal towns in the watershed of the Grand River and its tributaries are Pittsburg, Parsons, Emporia, and Chanute in Kansas, Joplin and Neosho in Missouri, Miami and Vinita in Oklahoma, and Bentonville in Arkansas.

2. (a) The Grand River is a nonnavigable stream.

(b) The Arkansas River, of which the Grand River is a tributary, is a navigable stream.

3. The first extensive studies on the feasibility of developing the lower Grand River for flood control and hydroelectric power purposes were completed in 1932 by the Army Corps of Engineers, an agency of the defendant. Possible dam and reservoir sites at Pensacola, Markham Ferry, and Fort Gibson on the Grand River were considered. A report relative to these studies was published in 1935 as House Document No. 308, 74th Congress, 1st Session. The report concluded that Federal development of the lower reaches of the Grand River was not economically justified at that time.

4. On April 26, 1935, the State of Oklahoma enacted legislation (Session Laws of Oklahoma, 1935, Ch. 70, Art. 4, p. 350 *et seq.*) creating the Grand River Dam Authority (the plaintiff in this action) for the development of hydro-[fol. 148] electric power on the Grand River.[1] The fol-

[1] The statutory provisions quoted in findings 4 and 5 relative to the establishment and functions of the plaintiff have been amended in a number of respects since 1935. However, none of these amendments is especially significant from the standpoint of the present litigation.

lowing statutory language was used in establishing the plaintiff:

> There is hereby created within the State of Oklahoma a conservation and reclamation district to be Known as "Grand River Dam Authority" (hereinafter called the District), and consisting of that part of the State of Oklahoma which is included within the boundaries of the Counties of Adair, Cherokee, Craig, Delaware, Mayes, Muskogee, Nowata, Ottawa, Rogers, Tulsa, Wagoner, Sequoyah, Osage, Washington, McIntosh, Creek, and Okmulgee. Such District shall be, and is hereby, declared to be a governmental agency and body politic and corporate, with the powers of government and with the authority to exercise the rights, privileges, and functions hereinafter specified, including the control, storing, preservation and distribution of the waters of the Grand River and its tributaries for irrigation, power and other useful purposes, the reclamation and irrigation of arid, semi-arid, and other lands needing irrigation, and the conservation and development of forests, water and hydro-electric power of the State of Oklahoma.

5. Among the powers, rights, and privileges conferred upon the plaintiff by the legislation creating it were the following:

> (a) To control, store and preserve, within the boundaries of the District, the water of Grand River and its tributaries for any useful purpose, and to use, distribute and sell the same within the boundaries of the District;
>
> (b) To develop and generate water power and electric energy within the boundaries of the District;
>
> * * * * * * *
>
> (e) To acquire by purchase, lease, gift, or in any other manner, and to maintain, use and operate any and all property of any Kind, real, personal, or mixed, or any interest therein, within or without the boundaries of the District, necessary or convenient to the exercise of the powers, rights, privileges, and functions conferred upon it by this Act;

(f) To acquire by condemnation any and all property of any Kind, real personal, or mixed, or any interest therein within or without the boundaries of the District necessary or convenient to the exercise of the [fol. 149] powers, rights, privileges and functions conferred upon it by this Act, in the manner provided by general law with respect to condemnation;

* * * * * * *

(i) To construct, extend, improve, maintain, and reconstruct, to cause to be constructed, extended, improved, maintained, and reconstructed, and to use and operate any and all facilities of any kind necessary or convenient to the exercise of such powers, rights, privileges and functions;

* * * * * * *

(o) To borrow money for its corporate purposes and, without limitation of the generality of the foregoing to borrow money and accept grants from the United States of America, or from any corporation or agency created or designated by the United States of America, and, in connection with any such loan or grant, to enter into such agreements as the United States of America or such corporation or agency may require, and to make and issue its negotiable bonds for moneys borrowed * * *.

6. Following its establishment in 1935, the plaintiff undertook the preparation of a comprehensive plan for the storage and control of the waters of the Grand River and its tributaries within the State of Oklahoma in order to make beneficial use of such waters for the development and generation of electric power and energy. By 1939, the plaintiff had developed a plan which contemplated the construction, maintenance, and operation by the plaintiff of three dam-and-reservoir projects on the Grand River, with hydroelectric generating units at the several projects. All were to constitute a single system functioning under unified control. The first of these projects was to be constructed at Pensacola, the second downstream from Pensacola at Markham Ferry, and the third downstream from

Markham Ferry at Fort Gibson. Under the plan, the Pensacola project was to provide the principal headwater and power storage, while the installations at Markham Ferry and Fort Gibson were to be "run of the river" plants. The plan contemplated that the water stored at Pensacola would be used three times for the generation of electric power and energy—first through the Pensacola unit, second through the Markham Ferry unit, and then through the Fort Gibson unit.

[fol. 150] 7. (a) While the preparation by the plaintiff of its comprehensive plan for the development of the water-power resources of the Grand River was in progress, further consideration was being given to the feasibility of a Federal development in that stream. Pursuant to a declaration of policy by the Congress in 1936, the Corps of Engineers conducted an investigation to determine the advisability of the construction by the defendant of three dams along the Grand River at Pensacola, Markham Ferry, and Fort Gibson. After public notice, a public hearing was held at Vinita, Oklahoma, on June 7, 1937. That meeting was called by the Corps of Engineers and was attended by various interested corporations, associations, private citizens, and officials of the State of Oklahoma and its agencies, including representatives of the plaintiff.

(b) At the hearing on June 7, 1937 mentioned in paragraph (a) of this finding, proposals for the construction by the defendant of three dams on the Grand River at Pensacola, Markham Ferry, and Fort Gibson were explained by representatives of the War Department.

(c) There was submitted at the hearing on June 7, 1937 a copy of a lengthy letter dated June 4, 1937 from the Director of the Division of Water Resources, Oklahoma Planning and Resources Board, an agency of the State of Oklahoma, to the District Office of the Corps of Engineers at Memphis, Tennessee, recommending the construction by the defendant of the three proposed projects at Pensacola, Markham Ferry, and Fort Gibson.

(d) At the hearing on June 7, 1937, the Chairman of the plaintiff's Board of Directors read and filed a statement which declared (among other things) that:

> The Grand River Dam Authority is ready to assume its responsibility. With the power given it by the

Oklahoma State Legislature we can and will issue bonds to carry out the part of the program as required by the United States Government.

a. Provide without cost to the United States all lands, easements, and rights-of-way necessary for the construction of the projects, i. e., Pensacola, Marken [sic] Ferry, and Ft. Gibson Dams.

b. Hold and save the United States free from damages due to the construction works; to pay for all alterations to bridges, highways, railroads, pipelines, [fol. 151] telephone and telegraph lines, and alterations to other existing improvements made necessary as a result of the construction.

c. Maintain and operate all the works after completion in accordance with regulations prescribed by the Secretary of War.

In so many words the Grand River Authority with its power to issue 15 million dollars worth of bonds, is ready at all times to cooperate with the government in construction of these dams. We can meet any requirement you make upon us. Gentlemen, we are Rarin' to go, *lets* build the Grand River Dams.

(e) In a report which was published in 1939 as House Document No. 107, 76th Congress, 1st Session, the Corps of Engineers recommended the construction and operation by the defendant of three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson. It was proposed in the report that the three projects be operated as one coordinated system in the combined interest of flood control and power development.

8. (a) In the meantime, the plaintiff began the construction of its contemplated dam and reservoir at Pensacola in 1938. The construction of this project by the plaintiff was financed by the Public Works Administration, an agency of the defendant, which made a grant to the plaintiff in the amount of $8,500,000 and a loan to the plaintiff in the amount of $11,500,000.

(b) On May 12, 1939, the plaintiff was authorized by the Oklahoma State Legislature to issue bonds in the aggregate amount of $10,000,000 for the construction of the

plaintiff's proposed projects at Markham Ferry and Fort Gibson.

(c) On July 26, 1939, the plaintiff obtained from the Federal Power Commission, an agency of the defendant, a license (No. 1494) for the operation of its Pensacola project. This license contained the following provisions (among others):

> Article 1. This license is issued for a period of fifty (50) years from January 1, 1939, and in consideration hereof and the benefits and advantages accruing hereunder to the Licensee, it is expressly agreed by the Licensee that the entire project, project area, and project works, as hereinafter designated and described, [fol. 152] whether or not located in, on, or along said Grand River or upon reservations of the United States, shall be subject to all the terms and conditions of this license.
>
> . . . . . .
>
> Article 13. The Licensee is hereby authorized to operate the reservoir in such manner as to utilize storage space below elevation 745 for power production purposes but not to utilize any storage space above said elevation 745 for power production purposes except during periods when the reservoir is being operated for the control of floods. The storage capacity between elevations 745 and 755 shall be expressly reserved for the control of floods. The Licensee shall impound flood waters in the storage space between elevations 745 and 755, and release flood waters therefrom, when, as, and in the manner directed by the Secretary of War, or his authorized representative: provided, that the Licensee shall not be required to impound any water above elevation 750 until the United States has acquired the necessary flowage rights above that elevation.
>
> Article 14. Subject to the provisions of Article 13, the operation of the project by the Licensee, so far as such operation may affect the use, storage, and discharge from storage, of waters, shall at all times be subject to the control of the Secretary of War under

such rules and regulations as he may prescribe in the interests of navigation and flood control, and subject to the control of the Commission under such rules and regulations as it may prescribe for the safety of the dam and for the protection of life, health, and property.

* * * * * * *

Article 20. The Licensee shall interpose no objections to nor in any way prevent the use of water for domestic purposes by persons or corporations occupying lands of the United States under permit along or near any stream or body of water, natural or artificial, used by the Licensee in the operation of the project works.

* * * * * * *

Article 26. * * * The Licensee further agrees, on behalf of itself, its successors and assigns, that, in the event the project is taken over by the United States upon the termination of this license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, it will be responsible for and will make good any defect of title to or of right of user in any such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge or will assume [fol. 153] responsibility for payment and discharge of all liens or incumbrances upon the project or project property created by said Licensee or created or incurred after the issuance of this license * * *.

(d) The plaintiff completed the construction of its Pensacola project in 1940. When completed, the project had a storage capacity of approximately 1,680,000 acre-feet at a maximum power-pool elevation of 745 feet above mean sea level, additional storage for flood control of approximately 520,000 acre-feet at elevation 755 above mean sea level, and a hydroelectric power plant with an initial installation of 80,000 kilowatts (which has since been increased to 90,000 kilowatts).

(e) During the period 1939-1940, the plaintiff acquired lands, easements, and rights-of-way, and constructed trans-

mission lines, substations, and facilities, for the connection and integration of its Pensacola project with its contemplated Markham Ferry and Fort Gibson units. The plaintiff also had surveys, plans, and specifications made for the construction of its proposed Markham Ferry and Fort Gibson units.

9. On June 24, 1941, the Secretary of War, in pursuance of the authority conferred on him by Articles 13 and 14 of the license issued by the Federal Power Commission in connection with the plaintiff's Pensacola project (see finding 8 (c)), approved the following regulations to govern the operation of that project in the interest of flood control:

> 1. Whenever the elevation of the reservoir exceeds elevation 745, the discharge facilities shall be operated so as (a) to reduce as much as practicable the flood damage below the reservoir and (b) to limit the elevation of the reservoir to elevation 750.
>
> 2. The District Engineer, Engineer Department at Large, in charge of the locality shall advise the [Grand River Dam] Authority when inflow rates are anticipated which may raise the elevation of the pool above elevation 745, and the maximum rate of release allowable. The Authority shall then take such measures to increase the storage capacity of the reservoir available for the control of floods as are not inconsistent with the development of power.
>
> 3. The Authority shall inform the District Engineer daily, promptly after taking the morning observations, as to the elevation of the resevoir pool and the tail [fol. 154] water, and the rates of release for the preceding 24 hours. Whenever the pool is above elevation 745 the Authority shall submit these reports by telegraph or telephone as directed by the District Engineer, supplemented by such additional telegraphic or telephonic reports as may be required by the District Engineer in the interest of flood control.

10. In the Flood Control Act of August 18, 1941 (55 Stat. 638, 645), Congress (among other things) modified a previously approved comprehensive plan for flood control and other purposes in the Arkansas River Basin by incorpo-

rating in the plan the three dam-and-reservoir projects on the Grand River at Pensacola, Markham Ferry, and Fort Gibson recommended by the Corps of Engineers in 1939 (see finding 7 (c)). The appropriation of funds for the construction of such works (among others) was authorized.

11. On November 21, 1941, the defendant took possession of the plaintiff's Pensacola project in accordance with the provisions of Executive Order 8944 (6 F.R. 5947). Thereafter, the project was operated by the defendant for national defense purposes until September 1, 1946, when it was returned to the plaintiff by the defendant.

12. (a) While the plaintiff's Pensacola project was being operated by the defendant for national defense purposes, plans were set in motion for the construction by the defendant of a dam and reservoir on the Grand River at Fort Gibson, in accordance with the congressional authorization mentioned in finding 10. A public hearing to consider the project was called and held by the Corps of Engineers at Muskogee, Oklahoma, on January 27, 1942.

(b) The Director of the Oklahoma Planning and Resources Board appeared at the hearing on January 27, 1942 and, on behalf of the Board, endorsed the proposal for the construction of a dam and reservoir at Fort Gibson by the defendant.

(c) Delay in the formulation of definite plans for the construction by the defendant of a dam-and-reservoir project at Fort Gibson was encountered because of the shortage of construction materials during World War II.

13. (a) In a letter dated December 24, 1943 and addressed to the War Department, the plaintiff stated that it desired that its property interest in the waters of the [fol. 155] Grand River be duly recognized in connection with the proposed construction of a Federal dam-and-reservoir project at Fort Gibson, and that it be paid just compensation for any appropriation of its water rights.

(b) In a reply dated January 6, 1944, the Chief of Engineers stated in part as follows:

> • • • I am pleased to assure you that if and when the Fort Gibson project is constructed, the property owners affected will be paid just compensation for property taken, within the meaning of the Federal Constitution.

However, this office does not consider that the action of the Oklahoma legislature in providing for the future development of the Fort Gibson site by the Grand River Dam Authority had the effect of creating property for which compensation must be paid by the Federal Government.

14. (a) In a letter dated September 25, 1945 from the Governor of Oklahoma to the Chief of Engineers, it was stated (among other things) as follows:

> Acting for the State of Oklahoma and in compliance with the requirements of Public Law 534 of the Seventy-eighth Congress, second session, I am pleased to approve the plans submitted for the comprehensive development of the Arkhansas River in this State, subject, as you also recommend, to such modification as later study may find desirable.
>
> The engineering and economic record of this report is complete and voluminous. I quite agree with your opinion that public benefits, especially from navigation, will greatly exceed the estimates of the report.
>
> I congratulate you upon the part you have played in developing this program and thank you for expediting its approval. It indicates a most worth-while development of the Arkansas Basin and forecasts prosperity and happiness for our people. I am unable to find words with which to express my commendation for your able and progressive leadership before and during the war in originating and developing this program
> * * *.

(b) The comprehensive plan mentioned in the letter of September 25, 1945 from the Governor of Oklahoma included the proposed construction by the defendant of a dam and reservoir at Fort Gibson on the Grand River.

15. (a) A letter was written by the plaintiff to the Chief of Engineers on February 14, 1946 relative to the antici- [fol. 156] pated issuance by the Corps of Engineers of an invitation for bids on the construction of the Federal dam and reservoir at Fort Gibson. This letter stated (among other things) that:

> The Authority now wishes to call your attention to the fact that the construction of this project by the Federal

Government will not only take and appropriate the Authority's water rights in Grand River but will appropriate and take other properties and rights of the Authority.

The letter further stated that the construction of the dam and reservoir at the Fort Gibson site by the Corps of Engineers would affect the property and rights of the plaintiff as follows:

1. The appropriation of lands, rights of way, easements, transmission lines and facilities, which the Authority has rightfully acquired and constructed for the purpose of connecting the Pensacola unit with the Markham's Ferry and Fort Gibson units.

2. The appropriation and making beneficial use of the waters of Grand River for the generation, distribution and sale of hydroelectric power and energy to the exclusion of the Authority.

3. The taking and converting to the Government's benefit of the vested property rights of the Authority in the Fort Gibson unit which were created by the construction and operation of the Pensacola dam and reservoir (head-water improvement), thereby preventing the Authority from utilizing said head-water benefits created by the Pensacola unit.

4. The taking of the Authority's right and franchise to develop, generate, distribute and sell electricity and electric energy at the Fort Gibson unit.

(b) In a reply dated March 11, 1946 to the letter of February 14, 1946 from the plaintiff, the Chief of Engineers stated (among other things) that he did not believe that it would be necessary for the defendant to pay compensation for the intangible rights claimed by the plaintiff in its letter. The Chief of Engineers further stated, however, that the obligation of the defendant to pay just compensation for any physical property of the plaintiff which might actually be taken for the proposed Fort Gibson project of the defendant was recognized.

16. Thereafter, construction of a dam-and-reservoir proj- [fol. 157] ect at Fort Gibson on the Grand River was begun by the Corps of Engineers on May 22, 1946, and was com-

pleted on June 15, 1950. Construction of a power house at the project was completed on June 30, 1953.

17. The Fort Gibson project was constructed by the defendant as an integral part of a comprehensive plan for the regulation of navigation, the control of floods, and the production of hydraelectric power on the Arkansas River, a navigable waterway, and its tributaries. The project has been operated to carry out these purposes.

18. (a) The defendant's Fort Gibson dam is located on the Grand River at a point approximately 50 miles below the plaintiff's Pensacola project, and near the site of the plaintiff's contemplated Fort Gibson dam. It has at present an installed generating capacity of approximately 49,000 kilowatts, with provision to add additional generating capacity of 25,000 kilowatts in the future. The bottom of the power pool is at elevation 551 above mean sea level, and the top of the power pool is at elevation 554 above mean sea level. There is storage capacity between elevation 554 and elevation 582 that is reserved for the control of flood waters.

(b) The defendant's Fort Gibson project is a "run of the river" project; i.e., its reservoir provides pondage sufficient for fluctuations of inflow only over short periods of time, with a maximum drawdown of not more than three feet. There is sufficient pondage, based on all flows out of the plaintiff's Pensacola project, to produce 9,000 kilowatts of continuous power for only 13 days. The production of power at Fort Gibson is dependent upon releases of water from the plaintiff's Pensacola project.

19. (a) During the course of the construction by the defendant of its Fort Gibson project, a suit was instituted by the defendant in the United States District Court for the Northern District of Oklahoma[2] to condemn certain lands for use in connection with the project. Among the lands which the defendant was attempting to acquire by condemnation in that proceeding was a 70-acre tract belonging to the plaintiff. The plaintiff appeared in the

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[2] The style of the condemnation suit was United States v. 1,031.15 acres of land, more or less, situate in Mayes County, Oklahoma, and Ray Bonnella, Grand River Dam Authority, et al. (No. 2116-Civil).

[fol. 158] condemnation proceeding and took the position that the Secretary of War, at whose request the suit had been instituted, lacked the authority to condemn its land. The court held against the plaintiff on this issue. Thereafter, the plaintiff filed with the court an application for a distribution of compensation with respect to the land in question.

(b) It became necessary for the defendant, in connection with the development of its Fort Gibson project, to acquire flowage rights over certain lands owned by the plaintiff, and to provide for the relocation of a trasmission line operated by the plantiff. An agreement providing for the conveyance by the plaintiff of flowage easements to the defendant, and the relocation of the plaintiff's transmission line, was entered into between the defendant and the plaintiff on February 6, 1950. Under the agreement, the defendant paid to the plaintiff the sum of $210,140.80.

20. (a) In April 1954, the plaintiff sought to institute before the Federal Power Commission a proceeding against the defendant, the Secretary of the Army, and the Secretary of the Interior relative to the defendant's Fort Gibson project. In its petition, the plaintiff alleged (among other things) that the defendant's Fort Gibson project, without the use and aid of the storage and headwater improvements of the plaintiff's Pensacola project, was incapable of producing any firm electric power and energy; that through the use of the plaintiff's storage and headwater improvements at the Pensacola project, the defendant was able to produce at its Fort Gibson project approximately 94,600,000 kwh of firm energy per year; and that since about May 1, 1953, the defendant had been operating its Fort Gibson project and had been making use of the plaintiff's water storage and headwater improvements for the production and generation of electric power and energy, but had not paid or offered to pay to the plaintiff any compensation on account of such benefits. The plaintiff requested the Commission (among other things) to:

> * * * make and enter an Order determining and fixing the reasonable and equitable annual charges to be paid to the licensee by the United States for the benefits accruing to the Fort Gibson Power Project from the li-

[fol. 159] censee's storage and headwater improvements at its Pensacola Project * * *.

(b) In a letter dated June 11, 1954 from the Secretary of the Federal Power Commission to the plaintiff, it was stated (among other things) as follows:

> Section 10 (f) of the Federal Power Act does not provide for the assessment of headwater benefit charges to projects constructed and operated by the Federal government. Your petition is therefore not acceptable for filing and is returned herewith.

(c) Thereafter, the plaintiff sought and obtained a review by the United States Court of Appeals for the Tenth Circuit of the action of the Federal Power Commission in rejecting the petition mentioned in this finding. In a decision dated July 12, 1957 (246 F. 2d 453), the Court of Appeals upheld the Commission's action. Among other things, the court said (at p. 455) that Section 10 (f) of the Federal Power Act, as amended:

> * * * does not vest in the Commission power or authority to assess charges against the Fort Gibson project for benefits received from the headwater facilities at the Pensacola site. The subsection makes specific reference to the United States as one entitled under certain circumstances to receive compensation for headwater benefits. But no specific reference is made to the United States as one liable for the payment of compensation for benefits of that kind. In view of the specific reference to the United States in one instance and the absence of any specific reference to it in the other, there is no basis upon which it can be inferred or implied that Congress intended or purposed to include the United States among the owners of non-licensed projects liable for payment of compensation for upstream benefits. * * *

(d) The plaintiff did not apply to the Supreme Court for a writ of certiorari in connection with the decision of the United States Court of Appeals for the Tenth Circuit mentioned in paragraph (c) of this finding. Therefore, the judgment of the Court of Appeals is a final judgment.

21. (a) While the various events mentioned in findings 12-20 relative to the defendant's Fort Gibson project were transpiring, the plaintiff was endeavoring to proceed with [fol. 160] the construction of its proposed project at Markham Ferry on the Grand River.

(b) On August 9, 1946, the plaintiff filed with the Federal Power Commission an application for a preliminary permit under the Federal Power Act for a proposed hydroelectric development at Markham Ferry.

(c) By an order dated January 18, 1949, the Federal Power Commission dismissed the plaintiff's application referred to in paragraph (b) of this finding. The reason given by the Commission for such action was that the Congress had authorized the construction of a Federal project at Markham Ferry (see finding 10).

(d) In the act of July 6, 1954 (68 Stat. 450), Congress further modified the comprehensive plan for the development of the water resources of the Arkansas River Basin, as previously approved and modified (see finding 10), so as to authorize the construction of the Markham Ferry project on the Grand River by the plaintiff. The act also authorized the appropriation of not to exceed $6,500,000 as a monetary contribution by the defendant for flood control storage in the Markham Ferry project, and then provided (among other things):

> * * * That the acceptance by the Grand River Dam Authority of the foregoing amount shall constitute the agreement of the Grand River Dam Authority to hold and save the United States free and harmless from all claims heretofore or hereafter asserted of whatever nature including but not limited to acquisition of land, relocation, construction, operation and maintenance of the dam and reservoir * * *.

(e) By a letter dated August 12, 1954, the plaintiff again requested the Federal Power Commission to issue a license to it for the Markham Ferry project.

(f) In a letter dated August 19, 1954 and addressed to the Corps of Engineers, the plaintiff requested that there be placed in the Federal budget for the ensuing fiscal year an item calling for the appropriation of the $6,500,000 authorized in the act of July 6, 1954. The evidence does not

show whether this sum has ever been appropriated by the Congress and made available to the plaintiff.

[fol. 161] (g) On June 22, 1955, the Federal Power Commission issued an order granting to the plaintiff a license (No. 2183) for the construction and operation of the Markham Ferry project.

22. (a) Among the terms and conditions of the license that was issued to the plaintiff by the Federal Power Commission for the Markham Ferry project were the following:

> Article 12. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army. Such rules and regulations may include the construction, maintenance, and operation by the Licensee, at its own expense, of such lights and signals as may be directed by the Secretary of the Army.
>
> Article 13. The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee so far as they affect the use, storage, and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or

as the Commission may prescribe for the other purposes hereinbefore mentioned.

* * * * *

Article 17. * * * In the event the project is taken over by the United States upon the termination of the license, as provided in Section 14 of the Act, or is transferred to a new licensee under the provisions of Section 15 of the Act, the Licensee, its successors and assigns [fol. 162] will be responsible for and will make good any defect of title to or of right of user in any of such project property which is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and will pay and discharge, or will assume responsibility for payment and discharge, of all liens or incumbrances upon the project or project or property created by the Licensee or created incurred after the issuance of the license * * *.

(b) Article 12 was deleted by an order of the Commission issued on December 13, 1954.

(c) Article 13 was amended by an order issued by the Commission on December 13, 1954, and was amended again by an order issued by the Commission on March 22, 1957. As amended the second time, Article 13 reads as follows:

The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they effect the use, storage and discharge from storage of waters above the dead storage pool (dead storage pool being that portion of the pool which is not used for operational purposes), shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation and flood control, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the

Licensee shall release water from the project reservoir above the dead storage pool at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation or flood control, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

23. The Board of Directors of the plaintiff has never granted to the defendant, or to any department or agency thereof, any franchise, right, or privilege to develop and generate electric power and energy on the Grand River in Oklahoma, or any right, title, or interest in and to the waters of the Grand River for the production of electric power and energy, or any right to control, supervise, conserve, and develop the water power at the Fort Gibson dam [fols. 163-164] and reservoir project.

CONCLUSION OF LAW

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that the plaintiff is entitled to recover, together with interest thereon, as part of just compensation and judgment will be entered to that effect. The amount of recovery will be determined pursuant to Rule 38(c).

[fols. 165-166] Clerk's Certificate to foregoing transcript omitted in printing.

[fols. 167-168] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No.

[Title omitted]

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—October 8, 1959.

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 30th, 1959.

Earl Warren, Chief Justice of the United States.

Dated this 8th day of October, 1959.

[fol. 169] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1959

No. 503

UNITED STATES, Petitioner

vs.

GRAND RIVER DAM AUTHORITY

ORDER ALLOWING CERTIORARI.—December 14, 1959

The petition herein for a writ of certiorari to the United States Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 842845 1193